THE

INSTITUTIONS

OR

ELEMENTS OF JUSTINIAN,

In Four Books.

TRANSLATED FROM THE ORIGINAL LATIN,

BY

DR. HARRIS.

London:

Printed by W. Green & T. Chaplin, 1, Crane-Court, Fleet-Street,
FOR THE PROPRIETORS, MILITARY CHRONICLE AND MILITARY CLASSICS OFFICE, 14, CHARLOTTE-STREET, BLOOMSBURY, AND TO BE HAD OF ALL THE BOOKSELLERS.—1814.

A
BRIEF ACCOUNT OF THE RISE AND PROGRESS
OF
THE ROMAN LAW.

THE Roman state was at first governed solely by the authority of Romulus; but, when the people were increased, he divided them into thirty *Curiæ*, which he constantly assembled for the confirmation of his laws: and this practice of consulting the people was afterwards followed by the Roman Kings, all whose laws were collected by *Sextus Papirius*, and called *jus Papirianum*, from the name of their compiler. But, after the expulsion of Tarquin and the establishment of the republic, the greatest part of those Regal laws soon became obsolete; and those, which still remained in force, related chiefly to the priesthood. It thus happened, that the Romans for many years laboured under great uncertainty in respect to law in general; for, from the commencement of the consular state to the time of establishing the Twelve Tables, they were not governed by any regular system. But at length, the people growing uneasy at the arbitrary power of their magistrates, it was resolved, after much opposition from the patricians, that some certain rule of government should be fixed upon: and, to effect this purpose, a decemvirate was first appointed, composed solely of senators, who, partly from the laws of Greece and partly from their own laws still subsisting, framed ten tables, which, in the year of Rome 303, were submitted to the inspection of the people, and highly approved of. These however were still thought to be deficient; and therefore in the year following, when a new decemvirate was appointed, which consisted of seven patricians and three plebeians, they added two tables to the former ten: and now the whole was regarded but as one body of law, and entitled, by way of eminence, the *twelve tables*. But, although these new collected laws were most deservedly in the highest esteem, yet their number was soon found insufficient to extend to all matters of controversy, their conciseness was often the occasion of obscurity, and their extraordinary severity called aloud for mitigation. It therefore became a consequence, that the twelve tables continually received some explanation, addition, or alteration, by virtue of a new law, a senatorial decree, or a *plebiscite*. And here it will be proper to observe, how they differ: a *plebiscite* was an ordinance of the plebians or commonalty, which had the force of a law,

without the authority of the senate; and a *senatus-consultum*, or senatorial decree, was an order made by the senators assembled for that purpose; but to constitute a law, properly so called it was necessary, that it should first be proposed by some magistrate of the senate, and afterwards be confirmed by the people in general. Recourse was also had to the interpretation and decisions of the learned, which were so universally approved of, that, although they were unwritten, they became a new species of law, and were called *auctoritas prudentum* and *jus civile*. It must be here observed, that, soon after the establishment of the twelve tables, the learned of that time composed certain solemn forms, called actions of law, by which the process of all courts and several other acts, as adoption, emancipation, &c. were regulated. These forms were for above a century kept secret from the public, being in the hands only of the priests and magistrates; but about the year U. C. 448 they were collected and published by one Flavius, a scribe; and, from him, called the Flavian law; for which acceptable present the people in general shewed many instances of their gratitude. But, as this collection was soon found to be defective another was afterwards published by *Sextus Ælius*, who made a large addition of many new forms, which passed under the title of *jus Ælianum*, from the name of the compiler.

In process of time there also arose another species of law, called the *prætorian edicts:* which, although they ordinarily expired with the annual office of the prætor, who enacted them, and extended no farther than his jurisdiction, were yet of great force and authority; and many of them were so truly valuable for their justice and equity, that they have been perpetuated as laws.

These were the several principal parts of the Roman law, during the free state of the commonwealth; but, after the re-establishment of monarchy in the person of Augustus, the law received two additional parts; the imperial constitutions and the answers of the lawyers.

The constitutions soon became numerous, but were not framed into a body till the reign of Constantine the great; when Gregorius and Hermogenes, both lawyers of eminence, collected in two codes the constitutions of the pagan emperors, from the reign of Adrian to that of Dioclesian inclusive: but these collections were not made by virtue of any public authority, and are not now extant.

Another code was afterwards published by order of the emperor Theodosius the younger, which contained the constitutions of all the Christian Emperors, down to his own time; and this was generally received both in the eastern and western empires.

But these three codes were still far from being perfect; for the constitutions, contained in them, were often found to be contradictory; and they wanted, but too plainly, that regulation, which they afterwards underwent through the care of Justinian; who in the year of Christ 528 ordered the compilation of a new code, which was performed and published the year following by Tribonian and others; the three former codes being suppressed by the express ordinance of the Emperor. When this work was thus expeditiously finished, the emperor next extended his care to the Roman law in general, in order to render it both concise and perfect. The answers and other writings of the antient lawyers had long since acquired the full force of a law, and were now so numerous as to consist of nearly two thousand volumes; from which, by command of Justinian, the best and most equitable opinions were chosen; and being first corrected, where correction was necessary, were afterwards divided into fifty books, called *digests* or *pandects:* and, that they might be the more firmly established, the Emperor not only prohibited the use of all other law-books, but also forbad that any comment should be written upon these his new digested laws, or that any transcript should be made of them with abbreviations. But during the time of compiling the digests, it was thought expedient by Justinian, for the benefit of students, that an abridgement should be made of the whole Roman law; which work was soon performed in obedience to his order, and confirmed with the digests, under the title of institutions.

The emperor afterwards, upon mature deliberation, suppressed the first edition of his code, and published a second, which he intitled *Codex repetitæ prælectionis*, having omitted several useless laws, and inserted others, which were judged serviceable to the state.

The Justinian law now consisted of three parts, the institutions, the digests, and the second code. But the emperor, after the publication of the second code, continued from time to time to enact diverse new constitutions or novels, and also several edicts; all which were collected after his disease, and became a fourth part of the law.

The thirteen edicts of Justinian and the most of the novels were originally conceived in the Greek tongue; and so great was the decline of the Roman language at Constantinople within forty years after the death of this emperor, that his laws in general were not otherways intelligible to the major part of the people, than by the assistance of a Greek version: but, notwithstanding this disadvantage, they still subsisted entire, till the publication

of the Basilica, by which the east was governed, till the dissolution of the empire.

The laws published by Justinian were still less successful in the west; where, even in the life-time of the emperor, they were not received universally; and, after the Lombard invasion, they became so totally neglected, that both the code and the pandects were lost, till the 12th century; when it is said, that the pandects were accidentally recovered at Amalphi, and the code at Ravenna. But, as if fortune would make an atonement for her former severity, they have since been the study of the wisest men, and revered, as law, by the politest nations.

IMPERIAL PROMULGATION

IN

CONFIRMATION OF THE INSTITUTES.

In the Name of Our Lord JESUS CHRIST.

THE Emperor, Cæsar FLAVIUS JUSTINIANUS, Alemanicus, Gotthicus, Francicus, Germanicus, Anticus, Alanicus, Vandalicus, Africanus, Pius, Felix, Inclytus, Victor ac Triumphator, semper Augustus, to the Roman Youth greeting.

Of the use of Arms and Laws.

THE imperial dignity should be supported by arms, and guarded by laws, that the people, in time of peace as well as war, may be secured from dangers and rightly governed: for a Roman Emperor ought not only to be victorious over his enemies in the field, but should also take every legal course to clear the state from all those members, whose crafts and iniquities are subsersive of the law. Be it the care therefore of him, upon whom government devolves, to be renowned for a most religious observance of law and justice, as well as for his triumphs.

Of the Wars and Laws of Justinian.

I. By our incessant labours, and the assistance of divine providence, we have acquired the double fame of a lawgiver and a conqueror; for the Barbarian nations have proved us in battle and submitted to our yoke; even Africa and many other provinces, after so long an interval, are again added to the Roman empire: and yet this vast people, and our whole dominions, are governed either by laws enacted by ourselves; or laws, which, though framed by others, have by our sovereign authority been better regulated.

Of the Composition of the Code and Pandects.

II. When we had ranged the imperial constitutions in a regular order, and made those, which were before confused and contradictory, to agree perfectly with each other, we then extended our care to the numerous volumes of the antient law; and have now completed, through the favour of heaven, a work, which exceeded even our hope, and was attended with the greatest difficulties.

Of the end and use of the Institutes.

III. As soon as this our undertaking was accomplished, we summoned Tribonian, our chancellor, with Theophilus and Dorotheus, men of known learning and tried fidelity, whom we enjoined by our authority to compose the following Institutions, to the intent, that the rudiments of law might be more effectually learned, by the sole means of our imperial authority; and that your minds for the future should not be burthened with obsolete and unprofitable doctrines, but instructed only in those laws, which are allowed of and practised: and, whereas it was formerly necessary, that all students should go through a course of study, at least for the space of four years, preparatory to their reading the constitutions, they may now, (having been thought worthy of our princely care, to which they are indebted for the beginning and end of their studies,) apply themselves immediately to the imperial ordinances.

Division of the Institutes.

IV. When therefore, by the assistance of Tribonian and other illustrious persons, we had digested the whole antient law into fifty books, called Digests or Pandects, it was our pleasure, that the Institutions should be divided into four books, which might serve as the first elements, introductory to the science of the law.

Subject matter of the Institutes.

V. And, in these, we have briefly set forth the old laws, which formerly obtained, and those also, which for a time have lain dormant, but are now revived by our princely care.

Authority of the Institutes.

VI. The four books of our Institutions were compiled by Tribonian, Theophilus, and Dorotheus, from all the institutions of the antient law, but chiefly from the commentaries, institutions, and other writings of Caius. As soon as these our Institutions were finished and presented to us, we read and diligently examined their contents; and, in testimony of our approbation, we have now given them a constitutional authority.

Exhortation to the Study of the Law.

VII. Receive therefore our laws, and so profit by them, that, when the course of your studies is completely finished, you may with reason expect to bear a part in the government, and be enabled to exercise those offices, which are committed to your charge.

Given at *Constantinople* on the eleventh day before the calends of *December*, in the third consulate of the emperor JUSTINIAN, always august.

THE

INSTITUTIONS

OR

ELEMENTS OF JUSTINIAN.

Book the First.

TITLE I.

Of Justice and Right.

D. 1. T. 1.

Definition of Justice.

JUSTICE is the constant and perpetual desire of giving to every man that, which is due to him.

Definition of Jurisprudence.

I. Jurisprudence is the knowledge of things divine and human, and the exact discernment of what is just and unjust.

Of the Method in treating the Subject of Right.

II. These definitions being premised, we shall now proceed. But it seems right to begin our Institutions in the most plain and simple manner, although afterwards we intend to treat every particular with the utmost exactness; for, if at first we overload the mind of the student with a variety of things, we may cause him either wholly to abandon his studies, or bring him late, through a series of labours, to that knowledge, which he might otherwise have attained with ease and expedition.

First Precepts of General Law.

III. The precepts of the law are these: to live honestly, not to hurt any man, and to give to every one that, which is his due.

Of Public and Private Law.

IV. The law is divided into public and private. Public law regards the state of the commonwealth: but private law, of which we shall here treat, concerns the interest of individuals, and is tripartite, being collected from natural precepts, from the law of nations, and from the civil law of any particular city or state.

TITLE II.

Of Natural Law, of the Law of Nations, and Civil Law.

Of Natural Law.

THE law of nature is not a law to man only, but likewise to all other animals, whether they are produced on the earth, in the air, or in the waters. From hence proceeds the conjunction of male and female, which we among our own species style matrimony; from hence arises the procreation of children, and our care in bringing them up. We perceive also, that the rest of the animal creation are regarded, as having a knowledge of this law, by which they are actuated.

Distinction of the Jus Gentium and Jus Civile---In Definition and Etymology.

I. Civil law is distinguished from the law of nations, because every community uses partly its own particular laws, and partly the general laws, which are common to all mankind. That law, which a people enacts for the government of itself, is called the civil law of that people. But that law, which natural reason appoints for all mankind, is called the law of nations, because all nations make use of it. The people of Rome are governed partly by their own laws, and partly by the laws, which are common to all men. But we propose to treat separately of these laws in their proper places.

In Appellation and Effects.

II. All civil laws take their denomination from that city, in which they are established: it would therefore not be erroneous to call the laws of Solon or Draco the civil laws of Athens; and thus the law, which the Roman people make use of, is styled the civil law of the Romans, or of the Quirites; for the Romans are also called Quirites from Quirinus. Whenever we mention the words civil law, without addition, we emphatically denote our own law; thus the Greeks, when they say the poet, mean Homer, and the Romans Virgil. The law of nations is common to mankind in general, and all nations have framed laws through human necessity; for wars arose, and the consequences were captivity and servitude; both which are contrary to the law of nature; for by that law all men are free. But almost all contracts were at first introduced by the law of nations; as for intance, buying, selling, letting, hiring, society, a deposit, a *mutuum*, and others without number.

Division of the Law into written and unwritten, and subdivision of the written Law.

III. The Roman law is divided, like the Grecian, into written and unwritten. The written is six-fold, and comprehends the laws, the plebiscites, the decrees of the senate, the constitutions of princes, the edicts of magistrates, and the answers of the sages of the law.

Of a Law and a Decree of the People.

IV. A law is what the Roman people enact at the request of a senatorial magistrate; as for instance, at the request of a consul. A plebiscite is what the commonality enact, when requested by a plebeian magistrate, as by a tribune. The word commonality differs from people, as a species from its genus; for all the citizens, including patricians and senators, are comprehended under the term people. The term commonality includes all the citizens, except patricians and senators. The plebiscites, by the Hortensian law, began to have the same force, as the laws themselves.

Of the Senatus Consultam.

V. A senatorial decree is what the senate commands and appoints: for, when the people of Rome were increased to a degree, which made it difficult for them to assemble for the enacting of laws, it seemed but right, that the senate should be consulted instead of the whole body of the people.

The Constitution of the Prince.

VI. The constitution of the prince hath also the force of a law; for the people by a law, called *lex regia*, make a concession to him of their whole power. Therefore whatever the emperor ordains by rescript, decree, or edict, it is a law. These acts are called constitutions. Of these, some are personal, and are not to be drawn into precedent; for, if the prince hath indulged any particular man upon account of his merit, or inflicted any extraordinary punishment on a criminal, or granted him some unprecedented indulgence, these acts extend not to others in the like circumstances. But other constitutions are general, and undoubtedly bind all people.

Of the Honorary Jurisdiction.

VII. The edicts of the prætors are also of great authority. These edicts are called the honorary law, because those, who bear honours in the state, have given them their sanction. The curule ædiles also, upon certain occasions, published their edicts, which became a part of the *jus honorarium*.

Of the Responsa Prudentum.

VIII. The answers of the lawyers are the opinions of those, who were authorised to give their answers concerning matters of law. For antiently there were persons, who publicly interpreted the law; and to these the emperors gave a licence for that purpose. They were called *jurus-consulti*, and their opinions obtained so great an authority, that it was not in the power of a judge to recede from them.

Of the un-written Law.

IX. The unwritten law is that, which usage has approved; for all customs, which are established by the consent of those, who use them, obtain the force of a law.

Reason of the above Division.

X. The division of the law, into written and unwritten, seems to have taken rise from the peculiar customs of the Athenians and Lacedemonians. For the Lacedemonians trusted chiefly to memory, for the preservation of their laws; but the laws of the Athenians were committed to writing.

Division of Law into what is mutable and what immutable.

XI. The laws of nature, which are observed by all nations, inasmuch as they are the appointment of divine providence, remain constantly fixed and immutable. But those laws, which every city has enacted for the government of itself, suffer frequent changes, either by tacit consent, or by some subsequent law, repealing a former.

Of the Objects of Law.

XII. The laws, which we make use of, have relation either to persons, things, or actions. We must therefore first treat of persons; for it would be to little purpose to aim at knowledge in the law, while we are ignorant of persons, on whose sole account the law was constituted.

TITLE III.

Of the Rights of Persons.

D. 1. T. 5.

Division of Persons.

THE first general division of persons, in respect to their rights, is into freemen and slaves.

Definition of Liberty.

I. Liberty, or freedom, from which we are denominated free, is that natural power, which we have of acting, as we please, if not hindered by force, or restrained by the law.

Definition of Slavery.

II. Slavery is that, by which one man is made subject to another, according to the law of nations, though contrary to natural right.

Etymology of the Terms Servus and Mancipium.

III. Slaves are denominated *servi*, from the verb *servare*, to preserve: for it is the practice of our generals to sell their captives, being accustomed to preserve, and not to destroy them. Slaves are also called *mancipia (a manu capere)* in that they are taken by the hand of the enemy.

In what Manner Slaves are constituted.

IV. Slaves are either born such, or become so. They are born slaves, when they are the children of bond-women: and they become slaves, either by the law of nations, that is, by captivity, or by the civil law, which happens, when a free person, above the age of twenty, suffers himself to be sold, for the sake of sharing the price given for him.

The Distinctions of Freedmen and Slaves.

V. In the condition of slaves there is no diversity; but among those, who are free, there are many: thus some are *ingenui*, others *libertini*.

TITLE IV.

The Ingenuous.

Definition of the Term Ingenuous.

THE term *ingenuous* denotes a person, who is free at the instant of his birth, by being born in matrimony of parents, who are both ingenuous, or both libertines; or of parents, who differ in condition, the one being ingenuous, and the other a libertine. But, when the mother is free, although the father is a slave, or even unknown, the child is ingenuous: and when the mother is free at the time of the birth of her infant, although she was a bond-woman when she conceived it, yet such infant will be ingenuous. Also if a woman, who was free at the time of conception, is afterwards reduced to slavery and delivered of a child, her issue is, notwithstanding this, free born; for the misfortune of the mother ought by no means to prejudice her infant. It has been a question, whether the child of a woman, who is made free during pregnancy, but becomes bond before delivery, would be free born? Martianus proves, that the child of such woman would be free: for, in his opinion, it is sufficient, if the mother

hath been free at any time between conception and delivery; and this opinion is strictly true,

On the erroneous Manumission of Ingenuous Persons.

I. When any man is by birth ingenuous, it will not injure him to have been in servitude, and to have been afterwards manumitted: for there are diverse constitutions, by which it is enacted, that manumission shall not prejudice free birth.

TITLE V.

Of Libertines, or Freedmen.

Definition and Origin of Libertines and of Manumission.

LIBERTINES, or freed-men, are those, who have been manumitted from just servitude. Manumission implies the giving of liberty; for whoever is in servitude, is subject to the hand and power of another; but whoever is manumitted, is free from both.

Manumission took its rise from the law of nations; for all men by the law of nature are born in freedom; nor was manumission heard of, whilst servitude was unknown. But, when servitude, under sanction of the law of nations, invaded liberty, the benefit of manumission became then a consequence. For all men at first were denominated by one common appellation, till, by the law of nations, they began to be divided into three classes, viz. into *liberi*, or those, who are born free; into *servi*, or those, who are in slavery; and into *libertini*, who are those, who have ceased to be slaves, by having freedom conferred upon them.

The Modes of Manumission.

I. Manumission is effected by various ways; either in the face of the church, according to the imperial constitutions, or by the *vindicta*, or in the presence of friends, or by letter, or by testament, or by any other last will. Liberty may also be properly conferred upon a slave by diverse other methods, some of which were introduced by the constitutions of former emperors, and others by our own.

Time and Place proper for Manumission.

II. Slaves may be manumitted by their masters at any time, even whilst the prætor, the governor of a province, or the proconsul is going to the baths, or to the theatre.

Of the Division of Libertines now set aside.

III. The *libertini* were formerly distinguished by a threefold division. Those, who were manumitted, sometimes obtained what was called the greater liberty, and thus became Roman citizens; sometimes they obtained only the lesser liberty, and

became Latins, according to the law *Junia Norbana*; and sometimes they obtained only the inferior liberty, and became *Dedititii*, by the law *Ælia Sentia*. But, the condition of the *Dedititii* differing but little from slavery, the inferior liberty has been long since disused; neither has the name of Latins been frequent. It therefore being our ardent desire to extend our bounty, and to reduce all things into a better state, we have amended our laws by two constitutions, and re-established the antient usage; for antiently liberty was simple and undivided; that is, it was conferred upon the slave, as his manumittor possessed it; admitting this single difference, that the person manumitted became only a libertine, although his manumittor was ingenuous.

We have entirely abolished the name of *Dedititii* by a constitution published among our decisions, by which, at the instance of Tribonian, our quæstor, we have suppressed all disputes concerning the antient law. We have also, at the suggestion of the same illustrious person, altered the condition of the Latins, and corrected the laws, which related to them, by another constitution, which eminently distinguishes itself among the imperial sanctions: and we have made all the freed-men in general citizens of Rome, regarding neither the age of the person manumitted, nor of the manumitted, nor any of the forms of manumission, as they were antiently observed. We have also introduced many new methods, by which slaves may become Roman citizens; and the liberty of becoming such is that alone, which can now be conferred.

TITLE VI.

Persons unable to Manumit, and Reason of that Inability.

First head of the law Ælia Sentia, on Manumission with intent to defraud Creditors.

IT is not in the power of every master to manumit at will: for whoever manumits with an intent to defraud his creditors, may be said to commit a nullity, the law *Ælia Sentia* impeding all liberty thus granted.

Of Emancipation by Will.

I. A master, who is insolvent, may appoint a slave to be his heir with liberty, that thus the slave may obtain his freedom, and become the only and necessary heir of the testator, on supposition that no other person is also heir by the same testament; and this may happen, either because no other person was instituted heir, or because the person, so instituted, is unwilling to act, as

such. This privilege of masters was for wise and just reasons established by the above-named law *Ælia Sentia*: for it claimed a special provision, that indigent men, to whom no man would be a voluntary heir, might have a slave for a necessary heir to satisfy creditors; or otherwise, that the creditors themselves should make sale of the hereditary effects of the master in the name of the slave, lest the deceased should suffer ignominy.

Of constructive Manumission.

II. A slave also becomes free by being instituted an heir, although no mention was made of liberty in the testament: for our imperial constitution regards not only masters, who are insolvent, but, by a new act of our humanity, it extends generally; so that the very institution of an heir implies the conferring of liberty. For it is highly improbable, that a testator, although he hath omitted to mention liberty in his testament, would be willing, that the person, whom he hath instituted, should remain in servitude, since a testator would thus defeat his own purpose, and be destitute of an heir.

Of fraudulent Manumission.

III. A man may be said to manumit in order to defraud creditors, if he is insolvent at the time, when he manumits, or if he becomes insolvent by manumitting. It is however the prevailing opinion, that liberty, when granted, is not impeached, unless the manumittor had an intent to defraud, although his goods are insufficient for the payment of his creditors; for men frequently imagine themselves to be in better circumstances, than they really are. We therefore understand liberty to be then only impeded, when creditors are doubly defrauded; that is, both by the intention of the manumittor, and in reality.

Of Manumission by Minors.

IV. By the before-named law Ælia Sentia, a master, under the age of twenty years, cannot manumit, unless a just cause is assigned, which must be approved of by a council, appointed for that purpose, at whose command liberty is conferred by the *vindicta*.

Lawful causes of Manumission.

V. A minor is deemed to assign a just reason for manumission, when he alleges any of the following, viz. that the person to be manumitted is his father or mother, his son or daughter, his brother or sister, his preceptor, his nurse, his foster child, or his foster brother; or when he alleges, that he would manumit his slave, in order to constitute him his proctor; or his bond-women, with an intent to marry her, on condition, that the marriage is performed

within six months. But a slave, who is to be constituted a proctor, cannot be manumitted for that purpose, if he is under seventeen.

Of assigning a Cause.

VI. A reason, which has once been admitted in favour of liberty, whether true or false, cannot afterwards be disallowed.

Amendment of the Ælian Law.

VII. When certain bounds were prescribed by the law Ælia Sentia to all under twenty, with regard to manumission, it was observed, that any person, who was fourteen complete, might make a testament, institute an heir, and bequeath legacies, and yet that no person, under twenty, could confer liberty; which was not longer to be tolerated: for can any just cause be assigned, why a man, permitted to dispose of all his effects by testament, should be debarred from infranchising his slaves? But liberty being of inestimable value, and our ancient laws prohibiting any person to make a grant of it, who is under twenty years of age, We therefore make choice of a middle way, and permit all, who are in their eighteenth year, to confer liberty by testament. For since, by all former practice, persons at eighteen were permitted to plead for their clients, there is no reason, why the same stability of judgment, which qualifies them to assist others, should not be of advantage to themselves, by enabling them to infranchise their own slaves.

TITLE VII.

Of the Fusian Caninian Law.

By the law *Fusia Caninia*, all masters were restrained from manumitting more, than a certain number, by testament; but we have thought proper to abrogate this law, as odious and destructive of liberty; judging it inhuman, that persons in health should have power to manumit a whole family, if no just cause impedes the manumission, and that those, who are dying, should be prohibited from doing the same thing by testament.

TITLE VIII.

Of those who are independent and those who are under the power of others, (qui sui vel alieni juris sunt.)

Another division of Persons.

We now proceed to another division of persons; for some are independent, and some are subject to the power of others. Of those, who are subject to others, some are in the power of parents,

others in the power of their masters. Let us then inquire, what persons are in subjection to others; for, when we apprehend, who these persons are, we shall at the same time discover those, who are independent. Our first inquiry shall be concerning those, who are in the power of masters.

Of the Law of Nations respecting Slaves.

I. All slaves are in the power of their masters, which power is derived from the law of nations: for it is equally observable among all nations, that masters have always had the power of life and death over their slaves, and that whatsoever is acquired by the slave is acquired for the master.

Of the right of Roman Citizens over Slaves.

II. All persons, under our imperial government, are now prohibited to inflict any extraordinary punishment upon their slaves, without a legal cause. For, by a constitution of Antoninus, it is enacted, that whoever kills his own slave, without a just cause, is not to be punished with less rigour, than if he had killed a slave, who was the property of another. The too great severity of masters is also restrained by another constitution, made by the same prince: for Antoninus, being consulted by certain governors of provinces concerning those slaves, who take sanctuary either in temples, or at the statues of the emperors, Ordained, that, if the severity of masters should appear at any time excessive, they might be compelled to make sale of their slaves upon equitable terms, so that the full worth of such slaves might be given to masters: and this constitution seems just and reasonable, inasmuch as it is a maxim, expedient for the commonwealth, "that no one should be permitted to misuse even his own property." The rescript of this emperor, sent to Ælius Martianus, is conceived in the following words: The power of masters over their slaves ought by no means to be wrongfully diminished, neither ought any man to be deprived of his just right. But it is for the interest of all masters, that relief against cruelties, the denial of sustenance, or any other insufferable injury, should not be refused to those, who justly implore it. Therefore take cognizance of all complaints, made by those of the family of Julius Sabinus, whose slaves took sanctuary at the sacred statue; and, if you are made sensible of their having been more hardly treated than they ought, or of their having suffered any great injury, order them to be forthwith sold; and in such a manner, that they may never more be made subject to their former master: and, if Julius Sabinus endeavours by any fraud to evade our constitution, be it known to him, that such his offence shall be punished with the utmost rigor.

TITLE IX.

Of the Paternal Power.

THE children, whom we have begotton in lawful wedlock, are under our power.

Of Marriage.

I. Matrimony is a social contract between a man and woman, obliging them to an inseparable cohabitation during life.

The Paternal power peculiar to the Romans.

II. The power, which we have over our children, is peculiar to the citizens of Rome; for there is no other people, who have the same power over their children, which we have over ours.

Those subject to the Paternal power.

III. The issue of yourself and your legal wife are immediately under your own power. Also the issue of a son and son's wife, that is, either grand-sons or grand-daughters by them, are equally in your power; and the same may be said of great grand-children, &c. But children born of a daughter will not be in your power, but in the power of their own father, or father's father, &c.

TITLE X.

Of Marriage.

Of those who can legally contract Marriage.

THE citizens of Rome contract valid matrimony, when they follow the precepts of the law; the males, when they arrive at puberty, and the females, when they attain to a marriageable age. The males, whether they are *patres familiarum*, fathers of a family, or *filii familiarum*, the sons of a family; but, if they are the sons of a family, they must first obtain the consent of the parents, under whose power they are. For reason, both natural and civil, convinces us, that the consent of parents should precede marriage: and from hence it became a question, whether the son of a madman could contract matrimony? But, the opinions of lawyers being various, we published our decision, by which the son, as well as the daughter of a madman, is permitted to marry without the intervention of his father, provided always, that the rules set forth in our constitution, are observed.

Of Parents and Children.

I. We are not permitted to marry all women without distinction for there are some, with whom marriage is forbidden. For matrimony must not be contracted between parents and their children,

as between a father and daughter, a grand-father and his grand-daughter, a mother and her son, a grand-mother and her grand-son; and the same prohibition extends with respect to all ascendents and descendents in a right line in *infinitum*. And if such persons cohabit together, they have said to have contracted a criminal and incestuous marriage; which is undoubtedly true; inasmuch as those, who only hold the place of parents and children by adoption, can by no means marry: and the same law remains in force, even after the adoption is dissolved. Whoever therefore hath once been either your adopted daughter or grand-daughter, the same cannot afterwards be taken by you to wife, although she hath been emancipated.

Of Brothers and Sisters.

II. Matrimony is also prohibited between collaterals, but the prohibition is not of so great an extent, as that, which relates to parents and their children. A brother and sister are forbidden to marry, whether they are the children of the same father and mother, or of either. And, if any person becomes your sister by adoption, as long as such adoption subsists, a marriage contracted between her and you can not be valid. But, when the adoption is destroyed by emancipation, she may then be taken to wife. Also if you yourself are emancipated, there will not then remain any impediment, although your sister by adoption is not so. From hence it appears, that, if a man would adopt his son-in-law, he should first emancipate his daughter, and that, whoever would adopt his daughter-in-law, should previously emancipate his son.

Of the Daughter and Grand-Daughter of a Brother or Sister.

III. It is unlawful to marry the daughter of a brother, or a sister; neither is it lawful to marry the grand-daughter of a brother, or sister, although they are in the fourth degree. For when we are prohibited to take the daughter of any person in marriage, we are also prohibited to take his grand-daughter. But it appears not, that there is any impediment against the marriage of a son with the daughter of her, whom his father hath adopted; for they bear not to each other any relation either natural or civil.

Of Cousins.

IV. The children of two brothers, or two sisters, or of a brother and sister, may legally be joined together in matrimony.

Of Aunts.

V. A man is not permitted to marry his aunt on the father's side, although she is only so by adoption; neither can a man marry his aunt on the mother's side; because they are both esteemed to be the representatives of parents. And for the same

reason no person can contract matrimony with his great-aunt, either on his father's or his mother's side.

Of Affinity.---Of Wives, Daughters, and Daughters-in-law.

VI. We are under a necessity of abstaining from certain marriages, through a veneration for affinity; for it is unlawful to marry a wife's daughter, or a son's wife, in that both are in the place of daughters: and this rule must be understood to relate not only to those, who actually are, but also to those, who have been, our daughters-in-law at any time. For marriage with a son's wife, whilst she continues to be his wife, is prohibited on another account, viz. because the same woman can not, at one and the same time, be the wife of two. And the marriage of a man with his wife's daughter, whilst her mother continues to be his wife, is also prohibited, because it is unlawful for one man to have two wives at the same time.

Of the Wife's Mother and a Step-Mother.

VII. A man is forbidden to marry his wife's mother, and his father's wife, because they both hold the place of mothers; and this injunction must be observed, although the affinity is dissolved: for, omitting our veneration for affinity, a father's wife, whilst she continues to be so, is prohibited to marry, because no woman can have two husbands at the same time. A man is also restrained from matrimony with his wife's mother, her daughter continuing to be his wife, because it is against the law to have two wives.

Of the Son of a Husband and Daughter of a Wife.

VIII. The son of a husband by a former wife, and the daughter of a wife by a former husband, and *e contra*, the daughter of a husband by a former wife and the son of a wife by a former husband may lawfully contract matrimony, even though a brother, or sister, is born of such second marriage between their respective parents.

Of Daughters after Divorce.

IX. If a wife, after divorce, brings forth a daughter by a second husband, such daughter is not to be reckoned a daughter-in-law to the first husband. It is nevertheless the opinion of Julian, that we ought to abstain from such nuptials. It is also evident, that the espoused wife of a son is not a daughter-in-law to his father; and that the espoused wife of a father, is not a step-mother to his son: yet those, who abstain from such nuptials, demean themselves rightly.

Of servile Cognation.

X. It is not to be doubted, but that servile cognation is an impediment to matrimony, as when a father and daughter, or a brother and sister, are manumitted.

Of other Prohibitions.

XI. There are, besides these already mentioned, many other persons, who, for diverse reasons, are prohibited to marry with each other; all whom we have caused to be enumerated in the digests, collected from the old law.

Of the Penalties on unlawful Marriages.

XII. If any persons presume to cohabit together in contempt of the rules, which we have here laid down, they shall not be deemed husband and wife, neither shall their marriage, or any portion given on account of such marriage, be valid; and the children, born in such cohabitation, shall not be under the power of their father. For, in respect to paternal power, they resemble the children of a common woman, who are looked upon as not having a father, because it is uncertain who he is. They are, therefore, called in Latin *spurii*, and in Greek ἀπάτορες; i. e. without a father: and from hence it follows, that, after the dissolution of any such marriage, no portion, or gift, *propter nuptias*, can legally be claimed. But those, who contracted such prohibited matrimony, must undergo the farther punishments set forth in our constitutions.

Of Legitimation.

XIII. It sometimes happens, that the children, who at the time of their birth were not under the power of their parents, are reduced under it afterwards. Thus a natural son, who is made a Decurion, becomes subject to his father's power; and he also, who is born of a free-woman, with whom marriage is not prohibited, will likewise become subject to the power of his father, as soon as the marriage instruments are drawn, as our constitution directs; which allows the same benefit to those, who are born before marriage, as to those, who are born subsequent to it.

TITLE XI.

Of Adoptions.

Continuation.

IT appears from what has been already said, that all natural children are subject to paternal power. We must now add, that not only natural children are subject to it, but those also, whom we adopt.

Division of Adoption.

I. Adoption is made two ways, either by a rescript from the emperor, or by the authority of the magistrate. The imperial rescript impowers us to adopt persons of either sex, who are *sui juris*; i. e. independent and not under the power of their parents; and this species of adoption is called arrogation. But it is by

the authority of the magistrate, that we adopt persons actually under the power of their parents, whether they are in the first degree, as sons and daughters; or in any inferior degree, as grandchildren, or great grand-children.

Of those who may adopt, and those who may not.

II. But now, by our constitution, when the son of a family is given in adoption by his natural father to a stranger, the right of paternal power in the natural father is not dissolved, neither does any thing pass to the adoptive father, neither is the adopted son in his power, although such son is by us allowed to have the right of succession to his adoptive father, if he dies intestate. But if a natural father should give his son in adoption, not to a stranger, but to the maternal grandfather of such son; or if a natural father, who hath been emancipated, should give his son, begotten after emancipation, to his paternal or maternal grandfather, or great-grandfather, in this case, the rights of nature and adoption concurring, the power of the adoptive father is established both by natural ties and legal adoption, so that the adopted son would be both in the family, and under the power of his adoptive father.

Of the Arrogation of a Minor.

III. When any person, not arrived at puberty, is arrogated by the imperial rescript, the cause is first inquired into, that it may be known, whether the arrogation is justly founded, and expedient for the pupil: for such arrogation is always made on certain conditions; and the arrogator is obliged to give caution before a public notary, thereby binding himself, if the pupil should die within the age of puberty, to restore all the goods and effects of such pupil to those, who would have succeeded him, if no arrogation had been made. The arrogator is also prohibited to emancipate, unless he has given legal proof, that his arrogated son deserves emancipation; and even then he is bound to make full restitution, of all things belonging to such son. Also if a father, upon his death-bed, hath disinherited his arrogated son, or when in health hath emancipated him, without a just cause, then the father is commanded to leave the fourth part of all his goods to his son, besides what such a son brought to him at the time of arrogation, and acquired for him afterwards.

Of the Age of the Adoptor and Adopted.

IV. A junior is not permitted to adopt a senior; for adoption imitates nature; and it seems unnatural, that a son should be older than his father. He, therefore, who would either adopt or arrogate, should be a senior to his adopted or arrogated son by full puberty, that is, by eighteen years.

Of Adoption of Grand-Sons and Grand-Daughters.

V. It is lawful to adopt a person either as a grand-son or grand-daughter, great grand-son or great grand-daughter, or in a more distant degree, although the adoptor hath no son.

VI. A man may adopt the son of another as his grand-son, and the grand-son of another as his son.

Of Adoption in place of Grand-Son.

VII. If any man, who has already either a natural or an adopted son, is desirous to adopt another, as his grand-son, the consent of his son, whether natural or adopted, ought in this case to be first obtained, lest a *suus hæres*, or proper heir, should be intruded upon him. But, on the contrary, if a grand-father is willing to give his grand-son in adoption, the consent of the son is not necessary.

Of those who may be adopted.

VIII. He, who is either adopted or arrogated, bears similitude in many things to a son born in lawful matrimony; and therefore, whoever is adopted either by rescript, or before a prætor, or before the governor of a province, the same, if he is not a stranger, may be given in adoption to another.

Of Adoption by Impotents.

IX. It is observed as a common rule both in adoption, and arrogation, that such, who are impotent [whom we denominate *Spadones*] may adopt children; but that those, who are castrated, can not adopt.

Of Adoption by Women.

X. Women are also prohibited to adopt; for the law does not permit them to have even their own children under their power; but, when death hath deprived them of their children, they may, by the indulgence of the prince, adopt others, as a comfort and recompence for their loss.

Of Adoption by Rescript.

XI. It is peculiar to that kind of adoption, which is made by rescript, that, if a person, having children under his power, should give himself in arrogation, both he, as a son, and his children, as grand-children, would become subject to the power of the arrogator. It was for this reason, that Augustus did not adopt Tiberius, till Tiberius had adopted Germanicus; so that Tiberius became the son, and Germanicus the grand-son of Augustus, at the same instant, by arrogation.

Of the Adoption of Slaves.

XII. The following answer of Cato was approved of by the antient lawyers, viz. that slaves, adopted by their masters, obtain

freedom by the adoption. And, from hence instructed, we have enacted by our constitution, that a slave, whom any master nominates to be his son, in the presence of a magistrate, becomes free by such nomination, although it does not convey to him any filial right.

TITLE XII.

How the Paternal Power (Patriæ Potestas) may be terminated.

Of Death.

LET us now inquire how those, who are in subjection to others, can be freed from that subjection. The means, by which slaves obtain their liberty, may be fully understood by what we have already said in treating of manumission: but those, who are under the power of a parent, become independent at his death, yet this rule admits of a distinction. When a father dies, his sons and daughters are, without doubt, independent; but, by the death of a grand-father, his grand-children do not become independent unless it happens, that there is an impossibility of their ever falling under the power of their father. Therefore, if their father is alive at the death of their grand-father, and they are till then under his power, the grand-children in this case, become subject to the power of their father. But, if their father is either dead or emancipated before the death of their grand-father, they then can not fall under the power of their father, and therefore become independent.

Of Deportation.

I. If a man, upon conviction of some crime, is deported into an island, he loses the rights of a Roman citizen; and it follows, that the children of such a person cease to be under his power, as if he was naturally dead. And, by a parity of reasoning, if a son is deported, he ceases to be under the power of his father. But, if by the indulgence of the prince a criminal is wholly restored, he regains instantly his former condition.

Of Relegation.

II. A Father, who is relegated, retains his paternal power; and a son, who is relegated, still remains under the power of his father.

Of those reduced to Slavery by Law.

III. When a man is judicially pronounced to be the slave of punishment, he loses his paternal jurisdiction. The slaves of punishment are those, who are condemned to the mines, or sentenced to be destroyed by wild beasts.

Of Dignity.

IV. If the son of a family becomes a soldier, a senator, or a consul, he still remains under the power of his father, from which neither the army, the senate, nor consular dignity can emancipate him. But it is enacted by our constitution, that the patrician dignity, conferred by our special diploma, shall free every son from all paternal subjection. For it is absurd to think, that a parent may emancipate his son, and that the power of an emperor should not be sufficient to make any person independent, whom he hath chosen to be a father of the commonwealth; or, in other words, a senator.

Of Captivity and Postliminium.

V. If a parent is taken prisoner by the enemy, altho' he thus becomes a slave, yet he loses not his paternal power, which remains in suspense by reason of a privilege granted to all prisoners; namely, the right of return: for captives, when they obtain their liberty, are repossessed of all their former rights, in which paternal power of course must be included; and, at their return, they are supposed, by a fiction of law, never to have been absent. If a prisoner dies in captivity, his son is deemed to have become independent, not from the time of the death of his father, but from the commencement of his captivity. Also, if a son, or grand-son, becomes a prisoner, the power of the parent is said, for the reason before assigned, to be only in suspense. The term *postliminium* is derived from *post* and *limen*. We therefore aptly use the expression *reversus postliminio*, when a person, who was a captive, returns within our own confines.

Of Emancipation and its Effects.

VI. Children also cease to be under the power of their parents by emancipation. Emancipation was effected according to our antient law, either by imaginary sales and intervening manumissions, or by the imperial rescript; but it has been our care to reform these ceremonies by an express constitution, so that parents may now have immediate recourse to the proper judge or magistrate, and emancipate their children, grand-children, &c. of both sexes. And also, by a prætorian edict, the parent is allowed to have the same right in the goods of those, whom he emancipates, as a patron has in the goods of his freed-man. And, farther, if the children emancipated are within the age of puberty, the parent, by whom they were emancipated, obtains the right of wardship or tutelage, by the emancipation.

VII. A parent having a son under his power, and by that son a grandson or grand-daughter, may emancipate his son, and yet re-

tain his grand-son or grand-daughter in subjection. He may also manumit his grandson or grand-daughter, and still retain his son under his power; or, if he is so disposed, he may make them all independent. And the same may be said of a great-grandson, or a great-grand-daughter.

Of Adoption.

VIII. If a father gives his son in adoption to the natural grand-father or great-grand-father of such son, strictly adhering to the rules laid down in our constitutions for that purpose enacted, which injoin the parent to make his intention manifest before a competent judge, in the presence of the person to be adopted, in no wise contradicting, and also in the presence of the adoptor, then does the right of paternal power pass wholly from the natural father to the adoptive, in whose person, as we have before observed, adoption has its fullest extent.

Of Grandson born after the Son was Emancipated.

IX. It is necessary to be known, that, if a son's wife hath conceived, and you afterwards emancipate that son or give him in adoption, his wife being pregnant, the child, which she brings forth, will, notwithstanding this, be born under your paternal authority. But, if the conception is subsequent to the emancipation or adoption, the child so conceived becomes subject, at his birth, either to his emancipated father, or his adoptive grand-father.

Children cannot compel their Parents to Emancipate.

X. Children, either natural or adopted, can rarely compel their parents by any method to dismiss them from subjection.

TITLE XIII.

Of Tutelage.

Of Persons in their own Right.

LET us now proceed to another division of persons. Of those, who are not in the power of their parents, some are under tutelage, some under curation, and some under neither. Let us then inquire what persons are under tutelage and curation; for thus we shall come to the knowledge of those, who are not subject to either. We will first treat of those persons, who are under tutelage.

Definition of Tutelage.

I. Tutelage, as *Servius* has defined it, is an authority and power, given and permitted by the civil law, and exercised over such independent persons, who are unable, by reason of their age, to protect themselves.

Definition of a Tutor.

II. Tutors are those, who have the authority and power before mentioned; and they take their name from the nature of their office. For they are called tutors, *quasi tuitores*; as those, who have the care of the sacred buildings, are called *œditui, quod œdes tueantur.*

Of Tutors by Will.

III. Parents are permitted to assign tutors by testament to such of their children, who are not arrived at puberty, and are under their power. And this privilege of parents extends without exception over sons and daughters. But grand-fathers can only give tutors to their grand-children, when it is impossible, that such grand-children should ever fall under the power of their father, after the death of their grand-father. And therefore, if your son is in your power at the time of your death, your grand-children by that son cannot receive tutors by your testament, although they were actually in your power, because at your decease they will become subject to their father.

Of Posthumous Children.

IV. As posthumous children are in many cases reputed to have been born before the death of their fathers; therefore tutors may be given by the testament of a parent as well to a posthumous child, as to a child already born, if such posthumous child, had he been born in the life-time of his father, would have been his proper heir and under his power.

Of Emancipated Children.

V. But if a father gives a tutor by testament to his emancipated son, such tutor must be confirmed by the sentence of the governor of the province without inquisition.

TITLE XIV.

Of who may be nominated Tutors by Will.

NOT only the father of a family may be appointed by testament to be a tutor, but also the son of a family.

Of a Slave.

I. A man may by testament assign his own slave to be a tutor with liberty. But note, that, if a master by testament appoints his slave to be a tutor without mentioning liberty, such slave seems tacitly to have received immediate liberty, and is thus legally enabled to commence a tutor: yet, if a testator through error, imagining his slave to be a free person, by testament appoints him as such, to be a tutor, the appointment will not avail. Also the absolute

appointment of another man's slave to be a tutor is altogether ineffectual: but, if the appointment is upon condition, that the person appointed obtains his freedom, then it is made profitably: but, if a man by testament appoints his own slave to be a tutor, *when he shall obtain his liberty*, the appointment will be void.

Of Minors and Madmen.

II. If a madman, or a minor, is by testament appointed to be a tutor, the one shall begin to act, when he becomes of sound mind, and the other, when he has completed his twenty-fifth year.

III. It is not doubted, but that a testamentary tutor may be given either *to* a certain time, or *from* a certain time, or conditionally, or before the institution of an heir.

Tutors are Personal.

IV. A tutor can not be assigned to any particular thing, or upon any certain account, but can only be given to persons.

Of Tutors generally.

V. If a man by testament nominates a tutor for his sons or his daughters, the same person seems also to be appointed tutor to his posthumous issue; because, under the appellation of son or daughter, a posthumous child is comprehended. But, should it be questioned, whether grand-children are denoted by the word sons, and can receive tutors by that denomination, we answer that under the general term, *children*, grand-children are undoubtedly included, but that the word sons does not comprehend them: for the word son, and grandson, widely differ in their signification. But, if a testator assigns a tutor to his descendents, it is evident, that not only his posthumous sons are comprehended, but all his other children.

TITLE XV.

Of the Lawful Tutelage of Agnates.

THE *Agnati* are, by the law of the twelve tables, appointed to be tutors to those, to whom no testamentary tutor was given; and these tutors are called legitime.

Who are Agnates.

I. *Agnati* are those, who are collaterally related to us by males, as a brother by the same father, or the son of a brother, or by him a grandson; also a father's brother, or the son of such brother, or by him a grandson. But those, who are related to us by a female are not said to be *agnate*, but *cognate*, bearing only a natural relation to us. Thus the son of a father's sister is not related to you by *agnation* but by *cognation*, and you are related to him in the

same manner; that is, by *cognation*; for the children of a father's sister follow the family of their father, and not that of their mother.

II. The law of the twelve tables, in calling the *agnati* to tutelage in case of intestacy, relates not solely to persons altogether intestate, in whose power it was to have appointed a tutor, but extends also to those, who are intestate only in respect to tutelage; and this may happen, if a tutor, nominated by testament, should die in the lifetime of the testator.

How the Rights of Agnation and Cognation are lost.

III. The right of agnation is taken away by almost every diminution, or change of state; for agnation is but a name given by the civil law; but the right of cognation is not thus altered; for although civil policy may extinguish civil rights, yet over our natural rights it has no such power.

TITLE XVI.

Of Diminution.

DIMINUTION is the change of a man's former condition, which is effected three ways, according to the threefold division of dimnution into the greater, the less, and the least.

Of the greater Diminution.

I. The greater diminution is, when a man loses both the right of a citizen and his liberty, which is the case of those, who by the rigor of their sentence are pronounced to be the slaves of punishment——and of freed-men, who are condemned to slavery for ingratitude to their patrons——and of all such, who suffer themselves to be sold, in order to become sharers of the price.

Of the less Diminution.

II. The less or mesne diminution is, when a man loses the rights of a citizen, but retains his liberty; which happens to him, who is forbidden the use of fire and water, or to him, who is transported into an island.

Of the least Diminution.

III. The least diminution is then said to have been suffered, when the condition of a man is changed without the forfeiture either of his civil rights, or his liberty; as when he, who is independent, becomes subject by adoption; or when the son of a family hath been emancipated by his father.

Of the Manumisson of a Slave.

IV. The manumission of a slave works not any change of state in him, because he had, before manumission, no state or civil capacity.

Of Change of Rank.

V. Those, whose dignity is rather changed than their state, are not said to have suffered diminution; and therefore it appears, that they, who are removed from the senatorial dignity, do not suffer diminution.

VI. What has already been said in a section of the preceding title, to wit, that the right of cognation remains after diminution, relates only to the least diminution. For, by the greater diminution, as for instance, by servitude, the right of cognation is wholly destroyed, even so as not to be recovered by manumission. The right of cognation is also lost by the less or *mesne* diminution, as by deportation into an island.

To what Agnati the Right of Tutelage belongs.

VII. Although the right of tutelage belongs to the *agnati*, yet it belongs not to all the *agnati* in common, but to those only, who are in the nearest degree. But, if there are many in the same degree, the tutelage belongs to all of them, however numerous. For example, if there are several brothers, they are called equally to tutelage.

TITLE XVII.

Of the Tutelage of Freed-men.

BY the same law of the twelve tables, the tutelage of freed-men, and freed-women, is adjudged to belong to their patrons, and to the children of such patrons: and this tutelage is called legitime, although it exists not nominally in the law; but it is as firmly established by interpretation, as if it had been introduced by express words. For, inasmuch as the law commands, that patrons and their children shall succeed to the inheritance of their freed-men or freed-women, who die intestate, it was the opinion of the antient lawyers, that tutelage also by implication should belong to patrons and their children. And the law, which calls the *agnati* to the inheritance, commands them to be tutors, because the advantage of succession ought to be attended in most cases with the burden of tutelage. We have said, in *most cases*, because when any person, not arrived at puberty, is manumitted by a female, such female is called to the inheritance, but not to the tutelage.

TITLE XVIII.

Of the legitime Tutelage of Parents.

IN similitude of the tutelage of patrons, another kind of tutelage is received, which is also called legitime; for if any parent eman-

cipates a son or a daughter, or a grand-son or a grand-daughter, who is the issue of that son, or any others descended from him by males in a right line and not arrived at puberty, then shall such parent be their legitime tutor.

TITLE XIX.

Fiduciary Tutelage.

THERE is another king of tutelage called *fiduciary*: for, if a parent emancipates a son or a daughter, a grandson or a granddaughter, or any other of his children, not arrived at puberty, he is then their *legitime* tutor: but, at his death, his male children of age become the *fiduciary* tutors of their own sons, or of a brother, a sister, or of a brother's children emancipated by the deceased. But, when a patron, who is a *legitime* tutor, dies, his children also become *legitime* tutors. The reason of which difference is this: a son, although he was never emancipated, becomes independent at the death of his father; and therefore, as he falls not under the power of his brothers, it follows, that he can not be under their legitime tutelage. But the condition of a slave is not altered at the death of his master; for he then becomes a slave to the children of the deceased. It must here be noted, that the persons above mentioned can not be called to tutelage, unless they are of full age; and our constitution hath in general commanded this rule to be observed in all tutelages and curations.

TITLE XX.

Of the Atilian, Julian, and Titian, Laws.

BY virtue of the law *Atilia*, the prætor of the city, with a majority of the tribunes, had authority to assign tutors to all such, who otherwise were not intitled to tutors: but, in the provinces, tutors were appointed by the respective governors of each province, in consequence of the law *Julia* and *Titia*.

Of contingent Tutors.

I. If a tutor had been given by testament conditionally, or from a certain day, another tutor might have been assigned by virtue of the above named laws, whilst the condition depended, or till the day came. Also if a tutor had been given simply, *i. e.* upon no condition, yet, as long as the testamentary heir deferred taking upon him the inheritance, another tutor might have been appointed during the interval. But the office of such tutor ceased, when the cause ceased, for which he was appointed; as when the event of the condition happened, the day came, or the inheritance was entered upon.

If the Tutor was taken by the Enemy.

II. By the *Atilian* and *Julio-titian* laws, if a tutor was taken by the enemy, another tutor was immediately requested, whose office ceased of course, when the first tutor returned from captivity; for he then resumed the tutelage by his right of return.

Of the disuse of the Atilian law.

III. The *Atilian* and *Julio-titian* laws, concerning the appointment of tutors, were first disused, when the consuls began to give tutors to pupils of either sex, with inquisition; and the prætors were afterwards invested with the same authority by the imperial constitutions. For, by the above mentioned laws, no caution was required from the tutors for the security of their pupils, neither were these tutors compelled to act.

Of the present law of Tutelage.

IV. But, by the latter usage, at *Rome* the præfect of the city, or the prætor according to his jurisdiction, and, in the provinces, the governors, (each in his respective province) may assign tutors, after an inquiry into their morals and circumstances: and an inferior magistrate, at the command of a governor, may also appoint tutors, if the possessions of the pupil are not large.

Law of Justinian.

V. But we, for the ease of our subjects, have ordained by our constitution, that the judge of *Alexandria* and the magistrates of every city, together with the chief ecclesiastic, may give tutors or curators to pupils or adults, whose fortunes do not exceed five hundred *aurei*, without waiting for the command of the governor, to whose province they belong. But all such magistrates must, at their peril, take from every tutor, so appointed, the caution required by our constitution.

Reason of Tutelage.

VI. It is agreeable to the law of nature, that all such, who are not arrived at puberty, should be put under tutelage, to the intent that all, who are not adults, may be under the government of proper persons.

Of Accounts by Tutors.

VII. Tutors therefore, since they have the administration of the affairs of their pupils, may be compelled to render an account, by an action of tutelage, when their pupils arrive at puberty.

TITLE XXI.

Of the Authority of Tutors.

THE authority or confirmation of a tutor is in some cases necessary, and in others not necessary. When a man stipulates to make

a gift to a pupil, the authority of the tutor is not requisite; but, if a pupil enters into a contract, there is a necessity for the tutor's authority; for it is an established rule, that pupils may better their condition, but not impair it, without the authority of their tutors. And therefore in all cases, where there are mutual obligations, as in buying, selling, letting, hiring, mandates, deposites, &c. he, who contracts with the pupil, is bound by the contract; but the pupil is not bound, unless the tutor hath authorised it.

Exception.

I. But no pupil, without the authority of his tutor, can enter upon an inheritance, or take upon him the possession of goods, or an inheritance in trust; for, although there may be a probability of profit, there is a possibility of damage.

How the Tutor is to exert his Authority.

II. If a tutor would authorise any act, which he esteems advantageous to his pupil, such tutor ought to be present at the negotiation: for the authority of a tutor can have no effect, when given by letter, by messenger, or after a contract is finished.

A Case in which a Tutor cannot act.

III. When a suit is to be commenced between a tutor and his pupil, inasmuch as the tutor cannot exercise his authority, as such, against himself, a curator, and not a prætorian tutor, (as it was formerly the custom,) is appointed, by whose intervention the suit is carried on; and, when it is determined, the curatorship ceases.

TITLE XXII.

How Tutelage is terminated.

Of Puberty.

PUPILS, both male and female, are free from tutelage, when they arrive at puberty. The ancients judged of puberty in males, not by years only, but also by the habit of their bodies. But our imperial majesty, regarding the purity of the present times, hath esteemed the inspection of males to be an immodest practice, and hath thought it proper, that the same decency, which was ever observed in respect to females, should be also observed in respect to males: and therefore, by our sacred constitution, we have enacted, that puberty in males should be reputed to commence immediately after the completion of their fourteenth year. But, in relation to females, we leave that wholesome and antient rule of law unaltered, by which they are esteemed marriageable after the twelfth year of their age is completed.

Of the Diminution of the Pupil.

I. Tutelage is determined before puberty, if the pupil is either arrogated or suffers deportation; and it also determines, if he is reduced to slavery, or becomes a captive.

Of a conditional Tutor.

II. But, if a testamentary tutor is given upon a certain condition, after that condition is fulfilled, the tutelage ceases.

Of the death of Tutor or Pupil.

III. Tutelage is also determined either by the death of the tutor, or by the death of the pupil.

Of the Diminution of Tutor or Pupil.

IV. When a tutor suffers the greater diminution of state, by which he at once loses his liberty and the privileges of a citizen, every kind of tutelage is then extinguished. But, if the least diminution is only suffered, as when a tutor gives himself in arrogation, then no species of tutelage is extinguished, except the legitime. But every diminution of state in pupils takes away all tutelage.

Of the term of Tutelage.

V. Those, who are by testament made tutors for a term only, are, at the expiration of such term, discharged from the tutelage.

Of the removal of Tutors.

VI. They also cease to be tutors, who are either removed from their office upon suspicion, or excuse and exempt themselves from the burden of tutelage for just reasons, of which we shall treat hereafter.

TITLE XIII.

Of Curators.

Of Adults.

MALES arrived at puberty, and females marriageable, do nevertheless receive curators, until they have completed their twenty-fifth year: for, although they have attained to puberty; they are not as yet of an age to take a proper care of their own affairs.

By whom Curators are appointed.

I. Curators are appointed by the same magistrates, who appoint tutors. A curator cannot be absolutely given by testament, but a curator, named in a testament, must be confirmed such, either by a prætor or the governor of a province.

To whom Curators are given.

II. No adults can be obliged to receive curators, unless *ad litem*; for a curator may be appointed to any special purpose, or to the management of any particular affair.

Of Madmen and Prodigals.

III. By a law of the twelve tables, all madmen and prodigals, although of full age, must nevertheless be under the curation of of their *agnati*. But, if there are no *agnati*, or if such, who do exist, are unqualified, then curators are appointed; at *Rome*, by the præfect of the city, or the prætor; and in the *provinces*, by the governors, after the requisite inquiry.

Of Impotents.

IV. Those, who are deprived of their intellects, or deaf, or mute, or subject to any continual disorder, inasmuch as they are unable to take a proper care of their own affairs, must be placed under curators.

Of Pupils.

V. Sometimes even pupils receive curators; for instance, when the legal tutor is unqualified: for a tutor must not be given to him, who already has a tutor. Also, if a testamentary tutor, or a tutor given by a *prætor* or the governor of a province, appears to be afterwards incapable of executing his trust, it is usual, although he is guilty of no fraud, to appoint a curator to be joined with him. It is also usual to assign curators in the place of such tutors who are not wholly excused, but excused for a time only.

Of an Agent to the Curator.

VI. If a tutor, by illness or any other necessary impediment, should be hindered from the personal execution of his office, and his pupil should be absent, or an infant, then the prætor or the governor of the province shall decree any person, whom the tutor approves of, to be the pupil's agent, for whose conduct the tutor must be answerable.

TITLE XXIV.

Of the Surety of Tutors.

IT is a branch of the prætor's office to see, that tutors and curators give a sufficient caution for the safety and indemnification of their pupils. But this is not always necessary; for a testamentary tutor is not compelled to give caution, inasmuch as his fidelity and diligence seem sufficiently approved of by the testator. Also all tutors, and curators, appointed to be such, after inquiry, are supposed in every respect to be qualified, and are therefore not obliged to give security.

I. If two, or more, are appointed by testament, or by a magistrate, after inquiry, to be tutors or curators, any one of them, by offering caution, may be preferred to the sole administration, or cause his co-tutor, or co-curator, to give caution, in order to

be admitted himself to the administration. Thus it appears, that a man cannot demand security from his co-tutor or co-curator; but that, by offering caution himself, he may compel his co-tutor, or co-curator, to give or receive caution. But, when no security is offered, if the testator hath appointed any particular person to act, such person must be preferred; but, if no particular person is specified by the testator, then must the administration be committed to such person or persons, whom a majority of the tutors shall elect, according to the prætorian edict: but, if they disagree in their choice, the prætor may interpose his authority. The same rule is also to be observed, when many, either tutors or curators, are nominated by the magistrate, viz. that a majority of them may appoint one of their number, to whom the administration shall be committed.

II. It is necessary to be known, that tutors and curators are not the only persons subject to an action, on account of the administration of the affairs of pupils, minors, and others under their protection. For a subsidiary action, which is the last remedy to be used, will also lie against a magistrate, either for intirely omitting to take sureties, or for taking such as are insufficient: and this action, according to the answers of the lawyers, as well as by the imperial constitutions, is extended even against the heir of any such magistrate.

III. And by the same constitutions it is expressly enacted, that all tutors and curators, who refuse to give caution, may be compelled to it.

IV. Neither the præfect of the city, nor the prætor, nor the governor of a province, nor any other, who has power to assign tutors, shall be subject to a subsidiary action: but those magistrates only are liable to it, who exact the caution.

TITLE XXV.

Of Excuses of Tutors or Curators.

Of the Number of Children.

PERSONS, who are nominated to be either tutors or curators, may, upon diverse accounts, excuse themselves; but the most general plea offered is that of having children, whether they are subject, or emancipated. For at *Rome*, if a man has three children living, in *Italy* four, or in the *provinces* five, he may therefore be excused from tutelage and curation, as well as from other employments of a public nature; for both tutelage and curation

are esteemed public offices. But adopted children will not avail the adoptor; they will nevertheless excuse their natural father, who gave them in adoption. Also grand-children by a son, when they succeed in the place of their father, will excuse their grandfather; yet grand-children by a daughter will not excuse him. But those children only, who are *living*, can excuse from tutelage and curation; for the deceased are of no service: and should it now be demanded, whether a parent can avail himself of those sons, whom war has destroyed? It must be answered,——that he can avail himself of those only, who have perished in battle: for those who have fallen for the republic, are esteemed to live for ever, in the immortality of their fame.

Of the Collectors of Taxes.

I. The emperor *Marcus* declared by rescript from his *Semestrial* council, that whoever is engaged in the administration of affairs relating to the treasury, may be excused from tutelage and curation, whilst he is so employed.

Of Absence on public Business.

II. Those, who are absent on the affairs of the republic, are exempted from tutelage and curation; and if such, who are already assigned to be either tutors or curators, should afterwards be absent on the business of the republic, their absence is dispensed with, whilst they continue in the public service; and curators must be appointed in their place; but, when such tutors return, they must then take upon them the burden of tutelage. But they are not intitled (as *Papinian* asserts in the fifth book of his answers) to the privilege of a year's vacation: for that term is allowed to those only, who are called, at their return, to a new tutelage.

Of the greater Magistrates.

III. By a rescript of the emperor *Marcus*, all superior magistrates may, as such, excuse themselves: but they cannot desert a tutelage, when once they have undertaken it.

Of a Lawsuit with the Pupil.

IV. No man can excuse himself from taking the office of a tutor or curator, by alleging a lawsuit with the pupil or minor, unless the suit is for all the goods, or the whole inheritance of such pupil or minor.

Of three Tutelages.

V. Three tutelages or curatorships, which are not acquired merely for advantage, will exempt a man, during their continuance, from the burden of a fourth. But the tutelage or curation

of many pupils, as of three or more brothers, under one patrimony, is reckoned only as a single tutelage or curation.

Of Poverty.

VI. The divine brothers have declared by their rescript, and the emperor *Marcus* by his separate rescript, that poverty is a sufficient excuse, when it can be proved to be such, as must render a man incapable of the burden imposed upon him.

Of ill Health.

VII. Illness also, if it is so great as to hinder a man from transacting his own business, is a sufficient excuse.

Of illiterate Persons.

VIII. By the rescript of the emperor *Antoninus Pius*, illiterate persons are to be excused; although in some cases an illiterate man may not be incapable of the administration.

Of the enmity of the Father.

IX. If a father through enmity appoints any particular person, by testament, to be tutor to his children, the motive of such an appointment will afford a sufficient excuse. But he, who by promise hath engaged himself to a testator, is not to be excused from the office of tutelage.

Of ignorance of the Testator.

X. The divine brothers have enacted by their rescript, that the pretence of being unknown to the father of a pupil is not to be admitted solely, as a sufficient excuse.

Eruptions.

XI. A capital enmity, against the father of a pupil or adult, will sufficiently excuse any man, either from tutelage or curatorship, if no reconciliation hath intervened.

XII. Also he, whose condition hath been controverted at the instance of the father of the pupil, is upon that account excused from the tutelage.

Of Age.

XIII. Any person, who is above seventy years of age, may be excused both from tutelage and curation. Also minors, as such, were formerly excusable; but, by our constitution, they are now prohibited from aspiring to these trusts; and of course all excuses are become unnecessary. It is also enacted by the same constitution, that neither pupils, nor adults, shall be called even to a legitime tutelage. For it is absurd that persons, who are themselves under governors, and known to want assistance in the administration of their own affairs, should notwithstanding this be admitted, either as tutors or curators, to have the management of the affairs of others.

Of Military Service.

XIV. And we must also observe, that no military person, although willing, can be admitted to became a tutor or curator.

Of Grammarians, Orators, and Physicians.

XV. Both at *Rome* and in the *provinces*, all grammarians, teachers of rhetoric, and physicians, who exercise their professions within their own country, and are within the number authorised, are exempted from tutelage and curation.

Of the time and manner of excuse.

XVI. He, who can allege many excuses, and hath failed in his proof of those, which he hath already given, is not prohibited from assigning others within the time prescribed. But tutors and curators of whatever kind, whether legal, testamentary, or dative, (if they are willing to excuse themselves) ought not to prefer an appeal merely on account of their appointment; but they should first exhibit their excuses before the proper magistrate: and this they ought to do within fifty days after they are certified of their nomination, on supposition, that they are within an hundred miles from the place, where they were nominated. But, if they are at the distance of more than an hundred miles, they are allowed a day for every twenty miles, and thirty days besides; which, taken together, ought never, according to *Scævola*, to make a less number of days than 50.

Extent of the office of a Tutor.

XVII. When a tutor is appointed, he is reputed to have the care of the whole patrimony of his pupil.

The Tutor not required to be Curator.

XVIII. He, who hath been the tutor of a minor, can not be compelled to become his curator: and, by the rescript of the emperors *Severus* and *Antoninus*, although the father of a family should, by testament, appoint any person to be first the tutor of his children, and afterwards their curator, if the person so appointed is unwilling to take upon him the curation, he is by no means compellable.

Of Husbands.

XIX. The same emperors have likewise, by their rescript, enacted, that an husband may excuse himself from being a curator to his wife, even after he hath begun to act.

Of false Allegations.

XX. If any man should, by false allegations, have appeared to merit a dismission from the office of tutelage, he is not therefore freed from the burden of this office.

TITLE XXVI.

Of Suspected Tutors and Curators.

THE accusation of a suspected tutor, or curator, is derived from the law of the twelve tables.

The Cognizance belongs to the Prætor.

I. At *Rome* the power of removing suspected tutors belongs to the prætor, and in the *provinces* to the governors, or to the legate of a proconsul.

Who may be suspected.

II. We have already shewed, what magistrates may take cognizance of suspected persons: let us now therefore inquire, what persons may become suspected. And indeed all tutors may become so, whether they are testamentary, or of any other denomination. For even a legitime tutor may be accused; neither is a *patron* less subject to an accusation; but we must remember, that, as such, his reputation must be spared although he is removed from his trust, as a suspected person.

Who may accuse Tutors.

III. It now remains, as a consequence, that we inquire, by whom suspected persons may be accused. It must therefore be known, that an accusation of this sort is of a public nature, and open to all. For, by a rescript of the emperors *Severus* and *Antoninus*, even women are admitted to be accusers; yet such only, who are induced to it by their duty, or by their relation to the minor: thus a mother, a nurse, or a grand-mother, may become accusers; and also a sister. But the prætor can at discertion admit any women, who acting with a becoming modesty, but impatient of wrongs offered to pupils, appears to have no other motive than to relieve the injured.

Adults may accuse their Curators.

IV. No pupil can bring an accusation of suspicion against his tutor: but adults, by the rescript of *Severus* and *Antoninus*, are permitted, when they act by advice of persons related to them, to accuse their curators.

Who may be suspected.

V. Any tutor, who does not faithfully execute his trust, let his circumstances be ever so sufficient to answer damages, may, according to *Julian*, be pronounced suspected. And it is also the opinion of the same Julian, (which opinion is adhered to in our constitutions,) that a tutor may be removed from his office, as suspected, even before he has begun to execute it.

Of the effect of Removal.

VI. When any person is removed upon *suspicion*, if it is of *fraud*, he is stigmatized with infamy; but, if of *neglect* only he does not become infamous.

Of the effect of Accusation.

VII. If any tutor is accused upon suspicion, his administration, according to *Papinian*, is suspended, whilst the accusation is under cognizance.

How the Action is finished.

VIII. If a suspected tutor or curator should die, pending the accusation, then the cognizance of it is extinguished.

If the Tutor fails of Appearance.

IX. If a tutor fails to appear, with an intent to defer the appointment of an allowance for the maintenance of his pupil, it is provided by the constitution of *Severus* and *Antoninus*, that the pupil shall be put into the possession of his tutor's effects; and that, a curator being appointed, those things, which will be impaired by delay, may be immediately put to sale: and therefore any tutor, who, by absenting himself, impedes the grant of an allowance to his pupil, may be removed, as suspected.

X. But if a tutor makes a personal appearance, and falsely avers, that the effects of his pupil are insufficient for an allowance, such tutor shall be remitted to the præfect of the city, and punished by him in the same manner, as he, who hath acquired a tutelage by bribery.

Of fraudulent Administration.

XI. Also a freed-man, who is proved to have fraudulently administred the tutelage of the son, or grandson of his patron, must be remitted to the præfect to be condignly punished.

Surety no excuse for a suspected Tutor.

XII. It is lastly to be observed, that they, who unfaithfully administer their trust, must be immediately removed from it, although they tender a sufficient caution. For the act of giving caution alters not the malevolent purpose of the tutor, but procures him a longer time for the continuance of his depredations. We also deem every man suspected, whose immoralities give cause for it: but a tutor or curator, who, although poor, is yet faithful and diligent, can by no means be removed, as a suspected person, merely on account of poverty.

THE

INSTITUTIONS

OR

ELEMENTS OF JUSTINIAN,

Book the Second.

TITLE I.

Of the Division of Things.

Twofold Division of Things.

WE have already treated of persons in the foregoing book; let us now therefore inquire concerning things, which may be divided into those, which can, and those, which can not come within our patrimony and be acquired; for some things are in common among mankind in general;——some are public;——some universal;——and some are such, to which no man can have a right. But most things are the private property of individuals, by whom they are variously acquired, as will appear hereafter.

Of the Air, running Water, the Sea, and the Shore.

I. Those things, which are given to mankind in common by the law of nature, are the air, running water, the sea, and consequently the shores of the sea: no man therefore is prohibited from approaching any part of the sea-shore, whilst he abstains from committing acts of violence in destroying farms, monuments, edifices, &c. which are not in common, as the sea is.

Of Rivers and Harbours.

II. All rivers and ports are public; and therefore the right of fishing in a port, or in rivers, is in common.

Definition of the Shore.

III. All that tract of land, over which the greatest winter-flood extends itself, is the sea-shore.

Of the Use and Property of Banks.

IV. By the law of nations the use of the banks of rivers is also public, as the rivers themselves are; and therefore all persons have the same liberty to bring their vessels to the land, to unload them, and to fasten ropes to trees upon the banks of a river, as they

have to navigate upon the river itself: but, notwithstanding this, the banks of a river are the property of those, who possess the land, adjoining to such banks; and therefore the trees, which grow upon them, are also the property of the same persons.

Of the Use and Property of the Sea-shore.

V. The use of the sea-shore is also public and common by the law of nations, as is the use of the sea; and therefore any person is permitted to erect a cottage upon it for his habitation, in which he may dry his nets, and preserve them from the water; for the shores are not understood to be a property in any man, but are compared to the sea itself, and to the sand or ground, which is under the sea.

Of Things which are universal.

VI. Theatres, ground appropriated for a race or public exercises, and things of the like nature, which belong to a whole city, are universal, and not the property of any particular person.

Of Things which belong to no one.

VII. Things sacred, religious, and holy, cannot be vested in any person, as his own: for that, which is of divine right, is *nullius in bonis*, and can be no man's property.

Of sacred Things.

VIII. Those things, which have been consecrated by the pontiffs in due form, are esteemed sacred; such are churches, chapels, and also all moveable things, if they have been properly dedicated to the service of God: and we have forbidden by our constitution, that these things should be either aliened or obligated, unless for the redemption of captives. But, if a man should consecrate a building merely by his own authority, it would not be rendered sacred by such a consecration; but the very ground, upon which a sacred edifice hath once been erected, will, according to *Papinian*, continue to be sacred, although the edifice is destroyed.

Of religious Things.

IX. Any man may at his will render any place, which belongs solely to himself, religious, by making it the repository of a dead body; yet, when two are joint possessors of a place or spot of ground, not before used for such a purpose, it is not in the power of the one, without the consent of the other, to cause it to become religious. But, when there is a sepulchre in common among many, it is in the power of any one joint-possessor to make use of it, although the rest should dissent. And, when there is a proprietor, and an usufructuary, of the same place, the proprietor, without the consent of the usufructuary, can not render it religious.

But it is lawful to lay the body of a dead person in a place, belonging to any man, who has given his consent to it; and, although he should dissent after the burial, yet the place becomes religious.

Of holy Things.

X. Holy things also, as the walls and gates of a city, are in some degree of divine right, and therefore the property of no man. The walls of a city are esteemed *sancti* or holy, inasmuch as any offence against them is always punished capitally; and therefore all those parts of the laws, by which punishments are inflicted upon transgressors, we generally term *sanctions.*

Of private Property.

XI. There are various means, by which things become the property of private persons. Of some things we obtain dominion and property by the law of nature, which (as we have already observed) is also called the law of nations: and we acquire a property in other things by the civil law. But it will be most convenient to begin from the more antient law: and that the law, which nature established at the birth of mankind, is the most antient, appears evident: for civil laws could then only commence to exist, when cities began to be built, magistracies to be created, and laws to be written.

Of the occupation of the Ferœ Naturæ.

XII. Wild beasts, birds, fish, and all the animals, which are bred either in the sea, the air, or upon the earth, do, as soon as they are taken, become instantly, by the law of nations, the property of the captor: for it is agreeable to natural reason, that those things, which have no owner, should become the property of the first occupant: and it is not material, whether they then are taken by a man upon his own ground, or upon the ground of another: but yet it is certain, that whoever hath entered into the ground of another for the sake of hunting or fowling, might have been prohibited from entering by the proprietor of the ground, if he had foreseen the intent. But, though wild beasts, or fowl, when taken, are esteemed to be the property of the captor, whilst they continue in his custody, yet, when they have once escaped and recovered their natural liberty, the right of the captor ceases, and they become the property of the first, who seizes them. And they are understood to have recovered their natural liberty, if they have run or flown out of sight; and even if they are not out of sight, when it so happens, that they can not without difficulty be pursued and retaken.

Of hunted Beasts.

XIII. It hath been a question, whether a wild beast is understood to belong to him, by whom it hath been so wounded, that it may easily be taken. And, in the opinion of some, it belongs to such person, as long as he pursues it; but, if he quits the pursuit, they say it ceases to be his, and again becomes the right of the first *occupant*. But others have thought, that property in a wild beast can not otherwise be obtained, than by actually taking it. And we confirm this latter opinion, because many accidents frequently happen, which prevent the capture.

Of Bees.

XIV. Bees also are wild by nature; and therefore, although they swarm upon a tree, which is yours, they are not reputed, until they are hived by you, to be more your property, than the birds, which have nests there; and therefore, if any other person shall inclose them in a hive, he thus becomes their proprietor. Their honeycombs also become the property of him, who takes them; but, if you observe any person entering into your ground, with that intent, you may justly hinder him. A swarm, which hath flown from your hive, is still reputed to continue yours, as long as it remains in sight, and may easily be pursued; but, in any other case, it will become the property of the *occupant*.

Of Peacocks, Pigeons, and tamed Animals.

XV. Peacocks and Pigeons are also naturally wild; nor is it any objection to say, that, after every flight, it is their custom to return: for bees do the same thing; and, that bees are naturally wild, is evident. Some have been known to have trained deer to be so tame, that they would go into, and return from the woods, at regular periods: and yet no man denies, but that deer are wild by nature. But, with respect to these animals, which go and return customarily, the rule to be observed is, that they are understood to be yours, as long as they appear to retain an inclination to return; but, if this inclination ceases, that they cease to be yours; and will again become the property of him, who takes them. And these animals seem then to cease to have an inclination to return, when they disuse the custom of returning.

Of Geese and Fowls.

XVI. But geese, and fowls, are not wild by nature; and this we are induced to observe, because there is a species of fowls, and a species of geese, which in contradistinction we term wild: and therefore, if the geese, or fowls of *Titius*, being disturbed and frightened, should take flight, they are nevertheless reckoned to

belong to him, in whatever place they are found, although he shall have lost sight of them: and whoever detains such animals, with a lucrative view, is understood to commit a theft.

Of Occupation in War.

XVII. All those things, which we take from our enemies in war, become instantly our own by the law of nations: so that free-men may be brought into a state of servitude by capture: but, if they afterwards escape, and shall have returned to their own people, they then obtain again their former state.

Of Wrecks.

XVIII. Precious stones, pearls, and other things, which are found upon the sea-shore, become instantly, by the law of nations, the property of the finder.

Of the product of Animals.

XIX. The product of those animals, of which we are the owners and masters, is, by the same law, esteemed to be our own.

Of Alluvion.

XX. And farther—that ground, which a river hath added to your estate by alluvion, [*i. e.* by an imperceptible increase,] is properly acquired by you according to the law of nations. And that is said to be added by *alluvion*, which is added in a manner, which renders it impossible to judge, how much ground is added in the space of each moment of time.

Of the effect of Floods.

XXI. But, if the impetuosity of a river should sever any part of your estate, and adjoin it to that of your neighbour, it is certain, that such part would still continue yours; but, if it should remain, for a long time, joined to the estate of your neighbour, and the trees, which accompanied it, shall have taken root in his ground, such trees seem, from the time of their taking root, to be gained and acquired to his estate.

Of Islands.

XXII. When an island rises in the sea, (an event which rarely happens) the property of it is in the occupant; for the property, before occupation, is in no man. But, if an island rises in a river, (which frequently happens) and is placed exactly in the middle of it, such island shall be in common to them, who posses the lands near the banks on each side of the river, according to the proportion of the extent and latitude of each man's estate, adjoining to the banks. But, if the island is nearer to one side, than the other, it belongs to them only, who possess lands next to the banks on that side, to which the island is nearest. But, if a river divides

itself and afterwards unites again, having reduced a tract of land into the form of an island, the land still continues to be the property of him, to whom it before appertained.

Of Rivers.

XXIII. If a river, entirley forsaking its natural channel, hath began to flow elsewhere, the first channel appertains to those, who possess the lands, close to the banks of it, in proportion to the breadth of each man's estate next to such banks: and the new channel partakes of the nature of the river, and becomes public. And, if after some time the river shall return to its former channel, the new channel commences to be the property of those, who possess the lands, contiguous to the banks of it.

Of Inundation.

XXIV. But it is otherwise in respect to lands, which are overflowed only; for an inundation alters not the face and nature of the earth; and therefore, when the waters have receded, it is apparent, that the property will be found still to remain in him, in whom it was vested before the inundation.

Of Specification.

XXV. When a man hath made any *species*, or kind of work, with materials, belonging to another, it is often demanded, which of them ought, in natural reason, to be deemed the master of it; ——whether he, who made the *species*, or he who was the undoubted owner of the materials? as, for instance, if any person should make wine, oil, or flour, from the grapes, olives, or corn of another,——should cast a vessel out of gold, silver, or brass, belonging to another man,——should make a liquor, called *mulse*, with the wine and honey of another,——should compose a plaster or collyrium, with another man's medicines,——should make a garment with another's wool,——or should fabricate, with the timber of another, a bench, a ship, or a chest?——And after much controversy concerning this question, between the *Sabinians* and *Proculians*, the opinion of those who kept a mean between the two parties, proved most satisfactory to us: and their opinion was this:——that, if the *species* can be reduced to its former, rude materials, then the owner of such materials is also to be reckoned the owner of the new *species:* but, if the *species* can not be so reduced, then he who made it, is understood to be the owner of it: for example; a vessel can easily be reduced to the rude mass of brass, silver, or gold, of which it was made; but wine, oil, or flour, can not be converted into grapes, olives, or corn; neither can *mulse* be resolved and separated into wine and honey.

But, if a man makes any species, partly with his own materials, and partly with the materials of another: as, for instance, if he should make *mulse* with his own wine, and another's honey; or a plaster, or eye-water, partly with his own, and partly with another man's medicines; or should make a garment with an intermixture of his own wool with the wool of another,——it is not to be doubted, in all such cases, but that he who made the *species*, is master of it; since he not only gave his labour, but furnished also a part of the materials.

Of Accession.

XXVI. If any man shall have interwoven the purple of another into his own vestment, then the purple, although it may be more valuable, doth yield and appertain to the vestment by accession; and he, who was the owner of the purple, may have an action of theft, and a personal action, called a *condiction*, against the purloiner; nor is it of any consequence, whether the vestment was made by him, who committed the theft, or by another: for although things, which become, as it were, extinct by the change of their form, can not be recovered identically, yet a *condiction* may be brought for the recovery of the value of them, either against the thief, or against any other possessor.

Of Confusion.

XXVII. If the materials of two persons are incorporated together, then the whole mass, or composition, is common to both the proprietors: for instance, if two owners shall have intermixed their wines, or shall have melted together their gold or their silver. The same rule is also observed, if diverse substances are so incorporated, as to become one *species*: as when *mulse* is made with wine and honey; or when an *electrum* is composed by an intermixture of gold and silver in different proportions: for in these cases it is not doubted, but that the species becomes common. Neither is any other rule observed, when either homogeneous, or even different substances, are confounded and incorporated together fortuitously, without the consent of their proprietors.

Of Commixion.

XXVIII. If the corn of *Titius* hath been mixed with the corn of another by consent, then the whole is in common; because the single bodies, or grains, which were the private property of each, are, by the mutual consent, made common. But if the intermixture was accidental, or if *Titius* made it without consent, it then seems, that the corn is not in common; because the single grains still remain ununited, and in their proper substance: for

corn, in such a case, is no more understood to be in common, than a flock would be, if the sheep of *Titius* should accidentally intermix with the sheep of another. But, if the whole quantity of corn should be retained by either of the parties, then an action in *rem* lies for the quantity of each man's corn: and it is the business and duty of the judge to make an exact estimate of the *quality*, or value, of the corn, belonging to each party.

Of what adheres to the Soil.

XXIX. When any man hath raised a building upon his own ground, he is understood to be the proprietor of such building, although the materials used in it were the property of another: for every building is an accession to the ground, upon which it stands. But, notwithstanding this, he, who was the owner of the materials, does not cease to be the owner; yet he cannot demand his materials, or bring an action for the exhibition of them; for it is provided, by a law of the twelve tables, that a person, whose house is built with the materials of another, cannot be compelled to restore those materials; but by an action, intitled *de tigno juncto*, he may be obliged to pay double the value: and here note, that all the materials for building are comprehended under the general term *tignum*. The above cited provision, in the law of the twelve tables, was made to prevent the demolition of buildings. But, if it happens that, by any cause, a building should be dissevered, or pulled down, then the owner of the materials, if he hath not already obtained double the value of them, is not prohibited to claim his identical materials, and to bring his action *ad exhibendum*.

Of building with your Materials on the Ground of another.

XXX. On the contrary, if a man shall have built an edifice with his own materials, upon the ground of another, such edifice becomes the property of him, to whom the ground appertains; for, in this case, the owner of the materials loses his property, because he is understood to have made a voluntary alienation of it: and this is the law, if he was not ignorant that he was building upon another's land: and therefore, if the edifice should fall, or be pulled down, such person can even then have no claim to the materials. But it is apparent, if the proprietor of the ground, of which the builder was in confirmed possession, should plead, that the edifice is his, and refuse to pay the price of the materials, and the wages of the workmen, that then such proprietor may be repelled by an *exception* of *fraud*: and this may assuredly be done, if the builder was the possessor of the ground *bona fide*. But it

may be justly objected to any man, who understood that the land appertained to another, "that he had built rashly upon that ground, which he knew to be the property of another."

Of Planting.

XXXI. If *Titius* sets another man's plant in his own ground, the plant will become the property of *Titius:* and, on the contrary, if *Titius* shall have set his own plant in *Mœvius's* ground, the plant will appertain to *Mœvius*; on supposition in either case, that it hath already taken root; for, until then, the property of the plant remains still in him, by whom it was planted. But from the instant in which a plant hath taken root, the property of it is changed: so that, if the tree of a neighbour borders so closely upon the ground of *Titius* as to take root in it, *and be wholly nourished there*, we may affirm, that tree is become the property of *Titius:* for reason doth not permit, that such a tree should be deemed the property of any other, than of him, in whose ground it hath cast its roots: and therefore, if a tree, planted near the bounds of the lands of one person, shall also extend its roots into the lands of another, such tree will become common to both the land proprietors.

Of Sowing.

XXXII. As all plants are esteemed to appertain to the soil, in which they have rooted, so every kind of grain is also understood to follow the property of that ground, in which it is sowed. But as he who hath built upon the ground of another, may (according to what we have already said) be defended by an *exception* of *fraud*, if the proprietor of the ground shall demand the edifice; so he, who at his own expence and *bona fide* hath sowed in another man's land, may also be benefited by the help of this *exception*.

Of Writing.

XXXIII. As whatever is built upon, or sowed in the ground, belongs to that ground by accession; so letters also, although written with gold, appertain to the paper or parchment upon which they are written. And therefore, if *Titius* shall have written a poem, an history, or an oration, upon the paper or parchment of *Seius*, then *Titius* will not be deemed the master of his own work, but the whole will be reputed to be *Seius's* property. But if *Seius* demands his books or parchments from *Titius*, and at the same time refuses to defray the expense of the writing, then *Titius* can defend himself by an *exception* of *fraud:* and this he may certainly do, if he was in possession of such papers and parchments *bona fide*; that is, honestly, and believing them to be his own.

Of Pictures.

XXXIV. If any man shall have painted upon the tablet of another, some think, that the tablet should yield and accede to the picture: but it is the opinion of others, that the picture (whatever the quality of it may be) should accede to the tablet. But it appears to us to be the better opinion, that the tablet should accede to the picture; for it seems ridiculous, that the painting of an *Appelles*, or a *Parrhasius*, should yield, as an accession, to a worthless tablet. But if he, who hath painted upon a tablet, demands it from the owner and possessor, and offers not the price of it, then such demandant may be defeated by an *exception* of *fraud*: but, if the painter is in possession of the picture, the owner of the tablet is intitled to an action called *utilis*, i. e. *beneficial*: in which case, if the owner of the tablet demands it, and does not tender the value of the picture, he may also be repelled by an *exception* of *fraud*, if he, who hath painted upon the tablet, was the possessor of it upon good faith. But, if he, who hath painted upon it, or any other, shall have taken away a tablet feloniously, it is evident, that the owner of it may prosecute such person by an action of theft.

Of Fruits reaped in error.

XXXV. If any man shall have purchased lands from another, believing the seller to have been the true owner, when in fact he was not, or shall have obtained an estate *bona fide*, either by donation, or any other just means, it is agreeable to natural reason, that the fruits, which he shall have gathered, shall be reckoned to have become his own, on account of his care in the culture and tillage: and therefore, if the true owner shall afterwards appear and claim his lands, he can have no action against the *bona fide* possessor, for those fruits and that product, which have been consumed. But this exemption from such an action is not granted to him, who knowingly keeps possession of another's estate; and therefore, when ever there is a *mala fides*, the possessor is compellable to restore all the mesne profits together with the lands.

Of the Usufructuary.

XXXVI. He, to whom the usufruct of lands belongs, can gain no property in the fruits ofsuch lands, until he hath actually gathered them; and therefore, if the usufructuary should die, whilst the fruits, although ripe, are yet ungathered, they could not be claimed by his heirs, but would be acquired by the proprietor of the lands; and the same may be said in general, in relation to farmers.

What are fruits.

XXXVII. In estimating the product of animals, we not only reckon milk, skins, and wool, but also their young: and, therefore lambs, kids, calves, colts, and pigs, appertain by natural right to the usufructuary; but the offspring of a female slave is not to be included within this product; and can belong to him only, in whom the property of such female slave is vested: for it seemed absurd to think, that man, for whom nature hath framed all things, should be enumerated among the productions of the brute creation.

Of the duty of the Usufructuary.

XXXVIII. He, who has the usufruct of a flock, ought (according to the opinion of *Julian*) to preserve the original number of his sheep intire, by supplying the place of those, which die, out of the produce of the flock: and the duty of a usufructuary is the same in regard to other things; for he ought to supply the place of dead vines, or trees, by substituting others in their stead; and to act in every respect, like a good husbandman.

Of Treasure trove.

XXXIX. It hath been allowed by the emperor *Adrian*, in pursuance of natural equity, that any treasure, which a man finds in his own lands, shall become the property of the finder; and that whatever is casually found, in a sacred or religious place, shall also become the property of him, who finds it. But, if a person, not making it his business to search, should fortuitously find a treasure in the ground of another, the emperor hath granted the half of such treasure to the proprietor of the soil, and half to the finder. He hath in like manner ordained, that, if any thing is found within the imperial demesnes, half shall appertain to the finder, and half to the emperor: and, similar to this, if a man finds any valuable thing in a place or district belonging to the treasury, the public, or the city, the same emperor hath decreed, that half shall appertain to the finder, and half to the treasury, the public, or the city, to which the place or district belongs.

Of Tradition. 1. *The Rule and its reason.*

XL. Things are also acquired (according to the law of nature) by tradition or livery; for nothing is more conformable to natural equity, than to confirm the will of him, who is desirous to transfer his property into the hands of another: and therefore corporeal things, of whatever kind they are, may be delivered; and, when delivered by the true owner, are absolutely aliened. *Stipendiary* and *tributary* possessions (and those, which are situated in the provinces, are so called) may also be aliened in the same manner: for between these, and the *Italian* estates, we have now

taken away all distinction, by our imperial ordinance: so that, on account of a donation, a marriage-portion, or any other just cause, *stipendiary* and *tributary* possessions may undoubtedly be transferred by livery.

2. Of Limitation.

XLI. Things, although sold and delivered, are not yet acquired by the buyer, until he hath either paid the seller for them, or satisfied him in some other manner; as by a bondsman or pledge. And, although this is so ordained by a law of the twelve tables, yet the same rule of justice is rightly said to arise from the law of nations; that is, from the law of nature. But if the seller shall have given credit to the buyer, we must affirm, that the things will then become instantly the property of the latter.

3. Ampliation.

XLII. It makes no difference, whether the owner of a particular thing delivered it himself, or whether another, to whom the care and possession of it was intrusted, shall have delivered it with the owner's consent. And, for this reason, if the free and universal administration of all business is committed by a proprietor to any certain person, and the committee, by virtue of his commission, shall sell and deliver any goods, then will such goods become the property of the receiver.

Of Fictitious Tradition.

XLIII. In some cases, even without delivery, the mere consent of the proprietor is sufficient to transfer property: as when it happens, that a person hath lent any thing to you, hath let it, or deposited it in your possession, and hath afterwards sold it to you, made a donation of it, or given it to you, as a marriage portion: for although he shall not have delivered it, for any of these last mentioned purposes, yet, as soon as it is by consent reputed to be yours, you have instantly acquired the property of it; and that as fully, as if it had actually been delivered to you, as a thing sold, a donation, or a marriage portion.

Of the Delivery of Keys.

XLIV. Also if a person hath sold any species of merchandise, deposited in a store-house, such person is understood to have transferred the property of his merchandise, as soon as he hath delivered the keys of the store-house to the buyer.

Of Missile Gifts.

XLV. It also sometimes happens, that the property of a thing is transferred, by the master of it, to an uncertain person: thus for instance, when the prætors and consuls cast their *missilia*, or liberalities, among the people, they know not what any particular

man will receive; and yet, because it is their will and desire, that what every man then receives shall be his own, it therefore instantly becomes his property.

Of Derelicts.

XLVI. By a parity of reason it appears true, that a thing, which hath been made a *derelict* by the owner, will become the property of the first occupant. And whatever hath either been thrown away, or abandoned by the owner, to the intent, that it might never more be reckoned among his possessions, is properly accounted a *derelict:* and therefore ceases to be his property.

Of Goods thrown over-board.

XLVII. But the law is otherwise in respect to those things, which are thrown over-board in a storm, for the sake of lightening a ship; for such things remain the property of the owners, inasmuch as it is evident, that they were not thrown away, through dislike, but that each person in the ship might avoid the dangers of the sea. And, upon this account, whoever hath, with a lucrative intention, taken away such goods, although found even upon the high sea, he is guilty of theft. And, with these, those goods may be ranked, which have dropped from a carriage in motion, without the knowledge of the owner.

TITLE II.

Of Things Corporeal and Incorporeal.

Second Division of Things.

THINGS may also be farther divided into *corporeal* and *incorporeal.* Things *corporeal* are those, which may be touched; as, for example, lands, slaves, vestments, gold, silver, and others innumerable. Things *incorporeal* are those, which are not subject to the touch, but consist in rights and privileges; as inheritances, usufructs, uses, and all obligations, in what manner soever they are contracted: nor is it an objection of any consequence to urge, that things *corporeal* are contained in an inheritance: for fruits, gathered from the earth, are *corporeal*; and that also is generally *corporeal,* which is due to us upon an obligation; as a field, a slave, or money: but it must be observed, that we here mean only the *right* to an inheritance, the *right* of using and enjoying any particular thing, and the *right* of an obligation; all which *rights* are undoubtedly *incorporeal.* And to these may be added the *rights,* or rather qualities, of rural and city estates, which are also termed *services.*

TITLE III.

Of the Rights and Services of Country and City Estates.

THE rights or services of rural estates are these; a *path*, a *road*, an *highway*, and an *aqueduct* or free passage for water. A *path* denotes the right of passing and repassing on foot over another man's ground, but not of driving cattle or a carriage over it. *A road* implies the liberty of driving either cattle or carriages: and therefore he, who hath a *path*, hath not a *road*: but he, who hath a *road*, hath inclusively a *path*; for he may use such *road*, when he doth not drive cattle. An *high-way* is a service, which imports the right of passing, driving cattle, &c. and includes in it both a *path* and a *road*: and an *aqueduct* is a service, by which one man may have the right of a free passage or conduit for water, through the grounds of another.

Of the Services of City Estates.

I. The services of city-estates and inheritances are those, which appertain and adhere to buildings: and they are therefore called the services of city-estates, because we call all edifices city-estates although they are built upon farms or in villages. It is required by city-services, that neighbours should bear the burdens of neighbours; and, by such services, one neighbour may be permitted to place a beam upon the wall of another;——may be compelled to receive the droppings and currents from the gutter-pipes of another man's house, upon his own house, area, or sewer; or may be exempted from receiving them;——or may be restrained from raising his house in height, lest he should darken the habitation of his neighbour.

Of other rural Services.

II. Some are with reason of opinion, that, among rural services, we ought to reckon those, by which we obtain the right of drawing water, watering and feeding cattle, making lime, digging sand, &c. in the ground of another.

Of those who may owe or acquire Services.

III. All these services are called the services of estates or inheritances; because they can not be constituted without an inheritance to support them; for no man can either owe, or acquire, a rural or city-service, if he possesses neither house nor lands.

How Service is contracted.

IV. When ever any one is willing to demise the right of a service to another, he may do it by contract and stipulation. A

man may also by testament prohibit his heir from heightening his house, lest he should obstruct the view of his neighbour: or may oblige his heir to permit the rafter of another man's house to be laid upon his wall: or to receive upon his own house the droppings of anothers: or to suffer any person to walk, drive cattle, or draw water in his grounds.

TITLE IV.

Of Usufruct.

Definition of Usufruct.

AN *usufruct* is the right of using and enjoying, without diminution, the things, which are the property of another. But although an *usufruct* is a right, and therefore incorporeal, yet, as it appertains always to a substance, it necessarily follows, that, if the substance perishes, the *usufruct* must cease.

How it is constituted.

I. The *usufruct* of things is frequently separated from the property; and this happens by various means: it happens, for instance, when the *usufruct* is bequeathed by testament: for the heir hath then only the nude property vested in him, whilst the legatee possesses the *usufruct*——or, on the contrary, it happens, when a testator hath bequeathed his lands without the *usufruct*; for then the legatary hath only the nude property, whilst the heir enjoys the profits: for the *usufruct* may be bequeathed to one man, and the lands, without the *usufruct*, to another. Yet, if any man would constitute an *usufruct* otherwise, than by testament, he must do it by paction and stipulation. But, lest the property of lands should be rendered wholly unbeneficial by deducting the *usufruct* for ever, it was thought convenient, that the *usufruct* should by certain means become extinguished, and revert to the property.

In what things it consists.

II. The *usufruct* not only of lands and houses is grantable, but also the *usufruct* of slaves, cattle, and other things; except those, of which the nature is such, that they may be consumed by using; for the *usufruct* of such things is neither grantable by civil policy, nor natural reason; and among these may be reckoned wine, oil, cloaths, &c. And money also is almost of the same nature; for by constant use, and the frequent change of owners, it in a manner becomes extinguished. But the senate, through a motive of public utility, hath ordained, that the *usufruct* of these things may be

constituted, if a sufficient caution is given upon this account to the heir: and therefore, if the *usufruct* of money is bequeathed, the money is so given to the legatary, as to make it instantly his own: but then the legatary, lest he should die, or suffer diminution, is obliged to give security to the heir for the repayment of a like sum. Other things also, which are in their nature liable to consumption in using, when the *usufruct* of them is bequeathed, are so delivered to the legatary, as to become wholly his property; but in this case, after an exact valuation hath been made, caution must be given to the heir for the payment of a sum, equal to such valuation, either at the death of the legatary, or if it happens, that he should suffer diminution. It is not therefore to be understood, that the senate hath created an *usufruct* of these things, which is impossible; but that the senate hath constituted a *quasi-usufruct* by means of a caution.

How it is finished.

III. The *usufruct* of a thing determines by the death of the usufructuary; and by two of the three diminutions; namely, the greatest and the middle diminution, or change of state: and also by not being used, according to the manner, and during the time prescribed: all which things are set forth in our constitution. The *usufruct* of a thing also determines, if the usufructuary hath surrendered it to the lord of the property; but a cession of it to a stranger does not work a surrender to the proprietor: or, on the contrary, an *usufruct* determines, if the usufructuary hath acquired the property of it: and this is called consolidation. And it is certain, if an house hath been consumed by fire, or hath fallen by means of an earthquake, or through decay, that then the *usufruct* of such house is wholly destroyed; and that no *usufruct* of the area, or ground of it, can afterwards become due to the usufructuary.

When it is finished.

IV. When the whole *usufruct* of a thing is determined, it then reverts to the property; and, from that instant of time, the owner of the nude property commences to have a full and intire power over the thing.

TITLE V.

Of Use and Habitation.

What is common both to use and usufruct.

THE *usufruct*, and the nude *use* of a thing, are both of them constituted, and both determined by the same means.

The difference between the usufruct and the use of Land.

I. There is less benefit and emolument in the *use* of a thing, than in the *usufruct*: for he, who hath but simply the use of lands, is understood to have nothing more than the liberty of using such a quantity of herbs, fruit, flowers, hay, straw, and wood, which may be sufficient to supply his daily exigencies: and he is permitted only to be commorant upon the land, on condition, that he neither becomes troublesome to the owner, nor impedes the husbandmen in their country-labors. And an usuary, having but a mere use, can neither, let, sell, or give away his right to another, although it is in the power of an usufructuary to convey his *usufruct*, either by lease, sale, or donation.

Use of Houses.

II. He, who hath but the mere use of an house, is understood to have a right in it so far only, as to enable him to inhabit it himself; for he hath no power to transfer this right to another: and it is hardly thought allowable, that he should receive a guest or a lodger. But the usuary, notwithstanding what has been said, hath a right to inhabit the house together with his wife, his children, and his freed-men: and also with such other free persons, who are in the quality of servants. And, agreeably to this, if the use of an house appertains to a woman, she also hath the liberty of living in it with her husband, and her dependents.

Of the use of a Slave and Beast of burthen.

III. He also, who hath simply the use of a slave, can benefit *himself* only by the labor and service of such slave: for it is by no means in the power of the usuary to transfer his right over to another. And the same law prevails in regard to beasts of burden.

Of the use of Cattle.

IV. If the use of cattle is left by testament; as, for example, the use of sheep; yet the usuary can neither use the milk, the lambs, nor the wool; for these of right belong to the *usufruct*. But the usuary may undoubtedly employ the sheep, in soiling and improving his lands.

Of Habitation.

V. An habitation, whether given by testament, or constituted by any other means, appears to be neither an use, nor an *usufruct*, but seems to be rather a *particular right*. And for the public utility and in conformity to the opinion of *Marcellus*, we have permitted, by our decision, that he, who hath an habitation, may not only live in it, but also let it to another.

VI. What we have already delivered, concerning real services, usufructs, uses, and habitations, may at this time be sufficient. Concerning inheritances, and obligations, we will treat in their proper places. We have already explained summarily by what means things are acquired, according to the law of nations; let us now therefore examine, by what means they are acquired according to the civil law.

TITLE VI.

Of Usucapion and Prescription.

The requisites of Usucapion. 1. *Good Faith.* 2. *Possession for time prescribed.* 3. *A just Title.*

IT was antiently decreed by the civil law, that he, who by means of purchase, donation, or any other just title, had obtained a thing from another, whom he thought to be the true owner of it, (although in reality he was not,) and, if it was moveable, had possessed it *bona fide* for the space of one year, either in *Italy* or the provinces——or, if it was immoveable, had possessed it for the term of two years within the limits of *Italy*, should prescribe to such thing by use: and this was held to be law, lest the dominion, or property of things, should be uncertain. But although it was thought by the more antient legislators, that the above mentioned terms were of sufficient length to enable every owner to search after his different kinds of property, yet a better determination hath suggested itself to our thoughts, lest the true owners should be defrauded, or too hastily excluded, by the circumscription of time and place, from the benefit of recovering their just due: and we have therefore promulged our ordinance, by which it is provided, that things moveable may be prescribed to after the expiration of three years, and that a possession, during a long tract of time, will also found a prescription to things immoveable: and note, that, by a *long tract of time*, we mean ten years, if the parties are present, (*i. e.* in the province,) and twenty years, if either of them is absent. By these means the property of things may be acquired; and this not only in *Italy*, but throughout our dominions in general, if the possession was justly founded.

Of Things out of Commerce.

I. But it is certain in some cases, that although there hath been a possession incontestably *bona fide*, yet no length of time will be sufficient to found a prescription; and this happens, when a man possesses, as his property, a free person, a thing sacred or religious, or a fugitive slave.

Of Things stolen or forcibly detained.

II. It is also equally certain, that no prescription can be founded to things moveable, which have been stolen; or to things immoveable, seized by violence; although such things have been possessed *bona fide*, during the length of time required by our constitution: for a prescription to things stolen is prohibited by a law of the twelve tables, and also by the law *Atilia*; and the laws *Julia* and *Plautia* forbid a prescription to things seized by violence. And it is not to be inferred from these laws, that a thief, or disseizor only, is prohibited to take by prescription: (for such are prohibited for another reason, namely, because they are fraudulent and dishonest possessors;) but all other persons are also disabled from prescribing to things stolen, or seized forcibly, although they shall have purchased such things *bona fide*, or otherwise received them upon a just account; and from hence it follows, that things moveable can not easily be prescribed to, even by honest possessors: for whoever hath either sold or delivered the goods of another knowingly, upon any consideration, he is guilty of theft. But this rule sometimes admits of exceptions: for in some cases a thing moveable may be prescribed to: thus, if an heir, thinking a particular thing to be hereditary, which in reality had only been lent, let to, or deposited with the deceased, shall have sold, given it, or otherwise disposed of it to another, who received it *bona fide*, it is not to be doubted but that the receiver may prescribe; for such thing can never be reputed *stolen*, inasmuch as it was honestly possessed from the beginning; and the heir, who hath aliened it, beleiving it to have been his own property, hath committed no theft. Also if he, who hath the usufruct of a female slave, either sells or gives away the child of such slave, believing it to be his own property, he does not commit theft; for theft can not be constituted without an intention to commit it. It may also happen, by various means, that one man may transfer the property of another without theft, and give a right of prescription to the possessor. And in regard to things immoveable the law ordains, that, if any man should take possession of an estate without force, by reason either of the absence, or negligence of the owner, or because he died without heirs, and (although he hath thus possessed the land dishonestly) shall have made livery of it to another, who took it *bona fide*, the land by long possession may be acquired by such taker, who can not be said to have received either a thing stolen, or possessed by violence: for the opinion of those antient lawyers, who held, that lands and things immoveable, might be stolen, is now abolished:

and it is therefore provided by the imperial constitutions, in favour of all such, who possess an immoveable property, that a long and undoubted possession ought not to be taken away.

Of purging defective Titles.

III. A prescription may sometimes be founded even to things, which have been stolen, or possessed by violence; as for instance, when such things shall have fallen again under the power of their true owner; for they are then reputed to be purged from the contamination of theft or violence, and may afterwards be claimed by prescription.

Of Things belonging to the Royal Treasury.

IV. The things, which appertain to our treasury, can not be acquired by prescription. But, when things escheatable have not been certified to the treasury, it is held by *Papinian*, that a purchaser, *bona fide*, may prescribe to any of them after delivery. And not only the emperor *Pius*, but the emperors *Severus* and *Antoninus* have also issued their rescripts, conformable to this opinion.

General Rule.

V. It is lastly to be observed, that, if any man shall purchase a particular thing *bona fide*, or obtain the possession of it by any other just title, he can by no means prescribe to it, unless the thing, in itself, is free from all manner of exception.

Of mistaken Possession.

VI. A mistake of the cause of possession shall not give rise to a prescription: as when he, who possesses a thing, imagines, that he hath purchased it, when he hath not purchased it; or that the thing was a gift, when in reality it was not given.

Of bona fide possession.

VII. If a thing immoveable is possessed by any man *bona fide*, so that the possession is justly commenced, then the heir of that man, when deceased, or the possessor of his goods, may continue the possession, so as to raise a prescription, although he is conscious, that what he possesses is the property of another; but, if the possession was commenced from the beginning *mala fide*, or unjustly, then will the continuance of it avail neither the heir, nor the possessor of the goods, although he was ignorant of any malefeazance. And we have enacted by our imperial constitution, that the time of usucapion or prescription to things moveable shall be continued in the same manner from the deceased to his successor.

VIII. And in regard to the computation of the years, necessary to raise a prescription, the emperors *Severus* and *Antoninus* have ordained by their rescript, that, between seller and buyer, the time of the continuance of the possession of the one shall be joined to the time of the continuance of the possession of the other.

Of Imperial Gifts, or Grants.

IX. It is enacted by an edict of the emperor *Marcus*, that, when a thing is purchased from the treasury, the purchaser, after an uninterrupted possession of it for the space of five years, subsequent to the sale, may repel the true owner by an exception of prescription. But the emperor *Zeno*, of sacred memory, hath well provided by his constitution, that all those, who by sale, donation, or any other title, have received things either moveable, or immoveable, from the public treasury, may instantly be secured in their possession, and made certain of success, whether they are plaintiffs or defendents——and that those, who think, that they are intitled to certain actions, either as proprietors or mortgagees of the things aliened, may commence their suits against the treasury, at any time within the space of four years, but not afterwards. And, in our own sacred ordinance, which we have lately promulged in favour of those, who receive any thing, whether moveable or immoveable, from the private possessions either of our-self, or of the empress, our consort, we have made the same regulations, which are contained in the above mentioned constitution of the emperor *Zeno*, concerning fiscal alienations.

TITLE VII.

Of Donations.

Of Donation.

THERE is another way, by which property is acquired, namely by donation; of which there are two kinds; the one *mortis causa*, i. e. on account of death; the other *non mortis causa*, i. e. not on account of death; and this takes effect, during the life of the donor.

Of Donation in prospect of Death.

I. A donation on account of death is that, which is made under an apprehension or suspicion of death: as when any thing is given upon condition, that, if the donor dies, the donee shall possess it absolutely; or that the thing given shall be returned, if the donor should survive the danger, which he apprehends; or should repent, that he hath made the gift; or, if the donee should die before the donor. Donations *mortis causa*, are now reduced, as far

as possible, to the similitude of legacies: for, when it was much doubted by our lawyers, whether a donation *mortis causa* ought to be reputed as a gift, or as a legacy, inasmuch as, in some things, it partakes of the nature of both, we then *constituted* and *ordained*, that every such donation should be considered as a legacy; and be made in the manner, which our constitution directs. But, in brief, a donation, *mortis causa*, is then said to be made, when a man so gives, as to demonstrate, that he would rather possess the thing given himself, than that the donèe should possess it; and yet, at the same time, evinces, that he is more willing that the donee should possess it, than his own heir.

The donation, which *Telemachus* makes to *Pirœus* in *Homer*, is of this species.

He (when *Pirœus* ask'd for slaves, to bring
The gifts and treasures of the *Spartan* king)
Thus thoughtful answer'd:——those we shall not move,
Dark and unconscious of the will of *Jove*.
We know not yet the full event of all:
Stabb'd in his palace, if your prince must fall,
Us, and our house, if treason must o'erthrow,
Better a friend possess them than a foe.
But on my foes should vengeance heav'n decree,
Riches are welcome then, not else, to me;
'Till then, retain the gifts.——— POPE'S ODYSS. lib. 17.

Of simple Donation.

II. Donations, made without any thought or apprehension of death, we call donations *inter vivos*; and these admit of no comparison with legacies: for, when once they are perfected, they cannot afterwards be revoked without cause: and donations are then esteemed perfect, when the donor hath declared and manifested his will either in writing or otherwise. And it is appointed by our constitution, that a donation *inter vivos* shall, in imitation of a sale, necessarily inforce a delivery; for when things are given they become fully and perfectly vested in the donèe, and it is incumbent upon the donor to deliver them: and, although it is enacted by the constitutions of our predecessors, that donations, amounting to the value of two hundred *solidi*, shall be publicly and formally enrolled and registered, we have yet thought it expedient to enlarge this sum to five hundred *solidi* by our ordinance, by which we permit all donations of less value to be firm and binding without insinuation or enrollment; and there are likewise some donations, which, although they exceed five hundred *solidi*, are yet of full force without insinuation. We have also,

for the enlargement of donations, enacted many other rules, all which may be collected by perusing our constitutions, set forth for that purpose. It nevertheless remains to be observed, that, when a donation is fully and validly made, the donor may revoke it on account of ingratitude in the donèe in some particular cases: and this may be done, lest he, who hath been liberal and kind to another, should in any of the instances, enumerated in our constitution, suffer either injury or damage from him, upon whom a benefit was conferred.

Of Donation before Marriage and by reason of Marriage.

III. There is also another species of donation *inter vivos*, which was wholly unknown to the ancient lawyers, being introduced by later emperors; this species of donations *inter vivos* was called *ante nuptias* (i. e. before marriage), and contained in it the following tacit condition; namely, that it should then take effect, when the marriage was performed; and these donations were properly called *ante nuptias*, because they could never be constituted after the celebration of matrimony. But, inasmuch as it was permitted by the antient law, that portions might be augmented after marriage, the emperor *Justin*, our father, hath enacted by his constitution, that donations called *ante nuptias* might also be augmented at any time, whilst the matrimony subsisted: and, as it was improper, that a donation should be still termed *ante nuptias* when it had received an augmentation *post nuptias*, i. e. after matrimony, we therefore being desirous, that our sanctions might become as prefect as possible, and that names should be properly adapted to things, have ordained and constituted, that the above mentioned donations may be not only augmented, but may also receive their commencement at any time during matrimony, and that for the future they shall not be called donations *ante nuptias*, but donations *propter nuptias*; i. e. on account of marriage: and thus these donations are made equal with portions; for as portions may be augmented, and even made, when matrimony is subsisting and persons are actually married, so donations, which are introduced on account of matrimony, may now not only precede marriage, but be augmented, or even constituted, after the celebration of it.

Of the Right of Accretion.

IV. There was formerly another manner of acquiring property by the civil law; namely by accretion; as for instance, if *Primus* had possessed a slave in common with *Titius*, and *Primus* had enfranchised that slave, either by the *vindicta* or by testament, then would the share of *Primus* in that slave be lost, and accrue

to *Titius*. But, inasmuch as it affords a bad example, that a man should be defrauded of his liberty, and that those masters, who are most humane, should suffer loss, whilst those, who are most severe, receive emolument, we have thought it necessary, that a proper remedy should be applied to this grievance; and we have found a method, by which the manumittor, his co-partner, and the freed person, may all partake of our beneficence: for we have decreed, (and it is manifest, that the antient legislators have often transgressed the strict rules of law in favor of liberty,) that freedom, although granted by one partner only, shall immediately take effect: so that the manumittor shall have reason to be pleased with the validity of his gift, if his co-partner is indemnified by receiving his share of the worth of the slave.

TITLE VIII.

WHO MAY ALIENATE AND WHO MAY NOT.

Of the Husband.

IT sometimes happens, that the proprietor of a thing cannot alien it, and on the contrary that he, who is not the proprietor, may alien it: for example, by the law *Julia* an husband is prohibited to make an alienation of lands, which came to him in right of his wife, unless his wife consents to the alienation: and yet every man is deemed the proprietor of whatever is given to him, as a marriage portion. But, in this respect, we have corrected the law *Julia*, and brought it into a better state; for, having observed, that this law regards only those immoveable possessions, which are situated within the precincts of *Italy*, and that, although it inhibits the husband to make a mortgage of such possessions, even with the consent of his wife, yet it permits him, with the consent of his wife, to make an alienation, we have therefore provided a remedy by our imperial authority; so that now no husband can either alien or mortgage, even with the consent of his wife, any immoveable possession, whether *provincial* or *Italian*, obtained with her, as a marriage portion; and we have been induced to make these regulations, lest the frailty of women should occasion the ruin of their fortunes.

Of Creditors.

I. But a creditor, by virtue of a compact, may sell or alien a pledge, although it is not his own property; yet this seems to be allowable for no other reason, than because the pledge is understood to be aliened by the consent of the debtor, with whom it was covenanted from the commencement of the contract, that

the creditor might be permitted to sell the pledge, if the money borrowed was not paid at the time stipulated. But, lest the creditors should be impeded from prosecuting, what is justly due to them, and lest debtors, on the contrary, should lose the property of their possessions too soon, we have in our ordinance, promulged for this purpose, instituted certain methods, by which the sale of pledges may be warrantably made: and, through the whole tenor of our constitution, a sufficient caution hath been taken in regard to both creditors and debtors.

Of Pupils.

II. It must now be observed, that no pupil, whether male or female, hath power to alien any thing without the authority of a tutor: and therefore, if a pupil, without the authority of his tutor, shall lend money to any man, such pupil contracts no obligation: for he is incapable of vesting the property of his money in the borrower; and therefore the money may be claimed by *vindication*, (that is, by a real action,) if it exists intire and unspent. But if money, lent by a minor, is consumed by the borrower, *bona fide*, (*i. e.* believing that the lender was of full age) it may be recovered from such borrower by condiction, that is, by a personal action. And, if such money is consumed by the borrower *mala fide*, an action *ad exhibendum* will lie against him.

III. But, on the contrary, the property of any thing may be transferred to pupils, whether male or female, without the authority of their tutors: yet, if a debtor makes a payment to a pupil, it is necessary that the debtor should be warranted by the authority of the pupil's tutor; otherwise he will not be acquitted of the debt: and this, for a most evident reason, was ordained by a constitution, which we promulged to the advocates of *Cæsarea*, at the suggestion of that most eminent man *Tribonian*, the quæstor of our sacred palace: and by this constitution it is enacted, that the debtor of a minor may lawfully pay any sum to his tutor or curator, if a judicial decree, permitting the payment, is previously obtained without expense to the minor: for, when the payment of a debt is warranted by, and subsequent to, the decree of a judge, it is always attended with the fullest security. But, although money hath been paid to a pupil, otherwise than we have ordained, yet, if he should afterwards require, that the money should be paid him again, and demand it by action, he might be deprived of his plea by an *exception* of *fraud*, if it could be proved, that he had become richer by the increase of this money; or even that he had preserved it safely. But, if the pupil hath

squandered and consumed the money paid to him, or lost it either by theft or violence, an exception of fraud will be of no benefit to the debtor, who will be compelled to make a second payment, because the first was made inconsiderately, without the authority of the tutor, and not according to our ordinance. Pupils are also incapacitated to pay money without the authority of their tutors; because money, when paid by a pupil without such authority, doth not become the property of him to whom it is paid: for the alienation of no one thing is granted to a pupil without the authority of his tutor.

TITLE IX.

By what Persons Things may be acquired.

Summary.

THINGS may be acquired not only by ourselves, but also by those who are under our power; and also by slaves, of whom we have the usufruct only——acquisitions may also be made for us by free-men——and even by slaves, whom we possess *bona fide*, although they are the property of another. Let us therefore inquire diligently concerning all these persons.

Of Children under Power.

I. It was anciently the law, that whatever estate came to children, whether male or female, who were under the power of their parents, it was acquired for the parents of such children without any diminution, if we except the *peculium castrense*: and these estates were so absolutely vested in the parents, that what was acquired by one child they might have given to another child, or to a stranger; or might have sold it, or applied in what manner, and to what purpose they thought proper: but this seemed to be inhuman; and we have therefore, by a general constitution, mitigated the rigour of the law in regard to children, and have, at the same time, maintained that honour which is due to parents; having ordained, that, if any thing accrues to the son by means of the father's fortune, the *whole* shall be acquired for the father, according to ancient practice: for can it be unjust, that the wealth, which the son hath obtained, by means of the father, should revert to him?) but that the dominion and property of whatever the son of a family hath acquired, by any other means, shall remain in the son; and that the father shall be intitled only to the usufruct of such acquisitions. And this we have thought proper to decree, lest that, which hath accrued to a man from his labour or good fortune, should be unjustly transferred to another.

Of the Emancipation of Children.

II. We have also regarded the interest of children in respect to emancipation: for a parent, when he emancipated his children, might, according to former constitutions, have taken to himself, if he was so inclined, the property of the third part of those things, which were excepted from paternal acquisition, retaining it as the price of emancipation. But it appeared to be inhuman, that the son should be thus defrauded of the third part of his property, and that the honour, which he had obtained by becoming independent, should be decreased by the diminution of his estate; and we have therefore decreed, that the parent instead of the third part of the property, which he formerly might have retained, shall now be intitled to an half-share, not of the property, but of the usufruct; so that the property will, for the future, remain intire in the son, and the father will enjoy a greater share: namely, half instead of a third part.

Of our Slaves.

III. Whatever our slaves have at any time acquired, whether by delivery, stipulation, donation, bequest, or any other means, the same is reputed to be acquired by ourselves, and we thus acquire things, although we are ignorant of, or even averse to, the acquisition; for he, who is a slave, can have no property. And, if a slave is instituted an heir, he cannot otherwise take upon himself the inheritance, than at the command of his master; but, if the slave is commanded to do this, the inheritance is as fully acquired by the master, as if he had been himself made the heir; and consequently a legacy, left to a slave, is acquired by his master. It is farther to be observed, that masters acquire by their slaves not only the property of things, but also the possession; for whatever is possessed by a slave, the same is deemed to be possessed by his master; who may therefore found a prescription to it by means of his slave.

Of Usufructuaries.

IV. In regard to those slaves, of whom the possessor has the usufruct only, it is an established rule, that, whatever they acquire by means of his goods, or by their own work and labour, it appertains to their usufructuary master: but whatever is obtained by a slave, otherwise than by those means, it belongs to him, who hath the property of the slave: and therefore, if a slave is instituted an heir, or hath received a legacy, or gift, the inheritance, legacy, or gift, will not be acquired for the usufructuary master, but for the proprietor.

Continuation.

V. The same rule is observed in regard to him, who is possessed as a slave *bona fide*, whether he is a free-man, or the slave of another: for the law concerning an usufructuary master prevails equally in relation to a *bona fide* possessor; and therefore whatever is acquired otherwise, than by the two causes abovementioned, it either belongs to the person possessed, if he is free; or to the proprietor, if the person possessed, is the slave of another. But a *bona fide* possessor, who hath gained a slave by *usucapion* or prescription, (inasmuch as he thus becomes the absolute proprietor,) can acquire by virtue of such slave, by all manner of ways. But an usufructuary master can not prescribe; first, because he can never be strictly said to possess, having only the power of using; and farther, because he knows, that the slave belongs to another. We nevertheless may acquire not only property, but also possession, by means of the slaves, whom we possess *bona fide*, or of whom we have only the usufruct; and even by means of a free person, of whom we have a *bona fide* possession. But, in saying this, we adhere to the distinction, which we have before explained, and speak of those things only, of which a slave may acquire the possession, either by means of the goods of his master, or by his own industry.

Of other Persons.

VI. It is apparent from what has been said, that we can by no means make acquisitions by free persons, who are not under our subjection, nor possessed by us *bona fide:* neither can we acquire property by another's slave, of whom we have neither the usufruct, nor the just possession. And this is meant, when it is said, that nothing can be acquired by means of a stranger; which we must understand with an exception; for it hath been determined according to the constitution of the emperor *Severus*, that possession may be acquired for us by a free person, as for instance by a proctor, not only with, but even without our knowledge; and, by this possession, the property may be gained, if the delivery was made by the proprietor; and an usucapion or prescription may be acquired, although the delivery was made by one, who was not the proprietor.

VII. The observations, which we have already made, concerning the acquisition of particular things, may suffice for the present; for we shall treat more opportunely hereafter in another place of the rights of legacies and trusts. We will now proceed to shew, how things may be acquired *per universitatem*, that is, wholly and in gross by one single acquisition: for example; if *Titius* is

nominated an heir, or seeks the possession of the goods of another, or arrogates any one as his son, or if goods are adjudged to him for the sake of preserving the liberty of slaves; in all these cases, the intire inheritance passes to *Titius*. Let us now, therefore, inquire into inheritances, which are of a twofold nature; for they proceed either from a testacy, or an intestacy. We will first treat of those, which come to us by testament; and, in doing this, it will be necessary to begin by explaining the manner of making testaments.

TITLE X.

Of Wills.

Etymology.

A testament is so called from the latin word *testatio*; because it bears witness or testimony to the determination of the mind.

Of Antient Wills.

I. But, lest the antient usage should be forgotten, it is necessary to observe, that two kinds of testaments were formerly in use; the one was practised in times of peace, and named *calatis comitiis*; because it was made in a full assembly of the people; and the other was used, when the people were going forth to battle, and was stiled *procinctum testamentum*. But a third species was afterwards added, which was called *per æs et libram*, because it was effected by emancipation, which was an alienation, made by an imaginary sale in the presence of five witnesses, and the *libripens* or balance-holder, all citizens of *Rome* above the age of fourteen, and also in the presence of him, who was called the *emptor familiæ* or purchaser. The two former kinds of testaments have been disused for many ages; and that, which was made *per æs et libram*, although it continued longer in practice, hath now ceased in part to be observed.

Of the Honorary or Prætorian Will.

II. The three kinds of testaments before mentioned all took their rise from the civil law; but afterwards another species was introduced by the edict of the prætor; for, by the *honorary* or *prætorian* edict, the signature of seven witnesses was decreed sufficient to establish a will without any emancipation or imaginary sale; but this signature of witnesses was not required by the civil law.

Of the Union of Civil and Prætorian Law.

III. When the civil and prætorian laws began to be blended together partly by usage, and partly by the emendation, made by

the imperial constitutions, it became an established rule, that all testaments should be made at one and the same time according to the civil law: that they should be sealed by seven witnesses according to the prætorian law, and that they should also be subscribed by the witnesses, in obedience to the constitutions. Thus the law concerning testaments seems to be tripartite: for the civil law inforces the necessity of having witnesses to make a testament valid, who must all be present at one and the same time without interval; the sacred constitutions ordain, that every testament must be subscribed by the testator and the witnesses; and the prætorian edict requires sealing, and fixes the number of witnesses.

Solemnity added by Justinian.

IV. To all these solemities we have made an addition for the better security of testaments and the prevention of frauds, having enacted by our constitution, that the name of the heir shall be expressed, by the hand-writing either of the testator, or of the witnesses; and that every thing shall be done in conformity to the tenor of our ordinance.

Of Seals.

V. Every witness to a testament, according to *Papinian*, may use the same signet: for otherwise, what must be the consequence, if seven seals should happen all to bear the same device? It is also allowable to seal with the signet of another.

Who may be Witnesses.

VI. Those persons are allowed to be good witnesses, who are themselves legally capable of taking by testament: but yet no woman, slave, or interdicted prodigal, no person under puberty, mad, mute, or deaf, nor any one, whom the laws have reprobated and rendered intestable, can be admitted a witness to a testament.

Of a Slave reputed to be Free.

VII. If a witness, at the time of attesting, was reputed to have been a free person, but afterwards appeared, to have been a slave at that time, the emperor *Adrian*, declared in his rescript to *Cato*, and afterwards the emperors *Severus* and *Antoninus* by their rescript decreed in a similar case, that they would aid such a defect in a testament, and cause it to be accounted equally firm, as if it had been made, as it ought; if the witness, at the time of sealing, was, in the estimation of all men, taken to be a free person, no one having made a question of his condition.

Of two or more Witnesses of the same Family.

VIII. A father and a son under his power, or two brothers, under the power of the same father, may be made witnesses to

a testament: for nothing hinders, but that several persons may be admitted witnesses, out of the same family, to a business, in which that family is not interested.

Of the Family of the Testator.

IX. No person can be a witness to a testament, who is under the power of the testator. And, if the son of a family gives away his military estate by testament after his dismission from the army, neither his father, nor any one under the power of his father, can be admitted a witness to it. For, in this case, the law does not allow of a domestic testimony.

Of the Heir.

X. No heir can be admitted a witness to that testament, by which he is appointed heir; neither can the testimony of any one be admitted, who is in subjection to such heir; nor the testimony of his father, to whom he is himself under subjection; nor the testimony of his brothers, if they are under the power of the same father; for this whole business, which is performed for the sake of completing a testament, is now always transacted between the testator, and the real or very heir. But formerly there was great confusion; for although the antients would never admit the testimony of the *emptor familiæ*, or the supposed heir, nor of any one allied to him by subjection, yet they admitted that of the real heir, and of those, who were connected with him by subjection; and the only precaution taken was to exhort and persuade those persons not to abuse their privilege. But we have corrected this practice, preventing by the coercion of law that, which the antient lawyers endeavoured to prevent by persuasion only: for we permit neither the real heir, who represents the *emptor familiæ* of the antients, nor any person allied to such real heir, to be a witness to the testament, by which he was nominated. And it is for this reason, that we have not suffered the old constitutions to be inserted in our Code.

Of Legataries and Trustees.

XI. But we refuse not the testimony of legataries and trustees, and of those, who are allied to them; because such persons are not universal heirs or successors: and, by virtue of our constitution, we have even specially granted to all legataries and trustees the liberty of bearing testimony; and therefore we grant this permission much more readily to those, who are in subjection to them, and to those, to whom they are subject.

Of the Material of the Will.

XII. It is immaterial, whether a testament is written upon a tablet of wax, upon paper, parchment, or any other substance.

Of the plurality of Tablets.

XIII. Any person may commit the same testament to diverse tablets, each of which will be an original, if the requisite forms are observed. And this sometimes is necessary; as when a man, who is going a sea-voyage, is desirous to carry his will with him, and at the same time to leave a counter-part of it at home for his better security. Innumerable other reasons for doing this may arise, according to the various necessities of mankind.

Of the Nuncupative Testament.

XIV. What we have already said concerning written testaments, is sufficient. But if any man is willing to dispose of his effects by a nuncupative testament; i. e. by a testament without writing, let him be assured, if, in the presence of seven witnesses, he declares his will by word of mouth, that such verbal declaration will be a complete and valid testament according to the civil law.

TITLE XI.

Of the Military Testament.

Formalities dispensed with in Military Wills.

THE before-mentioned strict observation of formalities, in the construction and formation of testaments, is dispensed with by the imperial constitutions, in regard to all military persons, on account of their unskilfulness in these matters. For, although they neither call the legal number of witnesses, nor observe any other solemnity, yet they may make a good testament, if they are actually upon service against an enemy. This was introduced by our own ordinance with good reason; and thus, in whatever manner the testament of a military person is conceived, whether in writing, or not in writing, it prevails according to his intention: but, when soldiers are not upon an expedition, and live in their own houses or elsewhere, they are by no means entitled to claim this privilege; but a soldier, who is upon actual service against an enemy, may make a testament, although he is the son of a family, and consequently under power; but, according to the common and general law, he must observe all the formalities, which are required of others, who are not soldiers, when they make their testaments.

Rescript of Trajan.

I. The emperor *Trajan* wrote, as follows, in his rescript to *Catilius Severus* concerning military testaments. "The privilege, which is given to military persons, that their testaments, in what-

over manner made, shall be valid, must be understood with this proviso, that it ought first to be apparent, that a testament was made in some manner: and here observe, that a testament may be made without writing, even by a person, who is not in the army. And therefore, if it appears, that the soldier, concerning whose goods question is now made before you, did, in the presence of witnesses, purposely called, declare what person should be his heir, and upon what slave, or slaves, he would confer the benefit of liberty, he shall be reputed to have made his testament without writing, and his will shall be ratified. But, if it is only proved, that he said to some one, as it often happens in discourse, *I appoint you my heir* — or — *I leave you all my estate*, such words do not amount to a testament. Nor are any persons more interested than the soldiery, that words so spoken should not amount to a will; for, if this was once allowed, witnesses might without difficulty be produced after the death of any military man, who would affirm, that they had heard him bequeath his estate, to whomever they please; and thus the true intentions of many would be defeated."

Of Mute and Deaf Soldiers.

II. A soldier, though mute and deaf, may yet make a testament.

Of Soldiers and Veterans.

The privilege of making testaments without the usual formalities was granted by the imperial constitutions to military men, to be enjoyed only during the time of actual service, and whilst they lived in their tents. For, if veterans after dismission, or even soldiers, if not upon service against the enemy, would make their testaments, they must not omit the forms required to be observed in common by all the citizens of *Rome*. And, if a testament is made by a soldier, even in his tent upon an expedition, yet, if the solemnities of the law are not adhered to, such testament will continue valid only for one year after his dismission from the army. Suppose therefore, that a soldier should die testate within a year after his dismission, and the event of the condition, upon which his heir is instituted, should not happen, until after the expiration of the year, would the testament of such soldier be valid? We answer, that it would prevail as a military testament.

Of a Will made before Military Service.

IV. If a man, before his entrance into the army, should make his testament without observing the requisite formalities, and afterwards, when he became a soldier, and was upon an expedition, should open his testament for the sake of adding to it, or of subtracting something from it; or if he should cause it to appear

manifestly by any other means, that he was willing that his testament should be valid, we pronounce, that it would be valid, by virtue of this new act, amounting to a republication of his will.

Of a Soldier given in Arrogation or Emancipation.

V. If a soldier is given in arrogation, or, being the son of a family, is emancipated, his testament is nevertheless good, having the same effect as if he had republished it by a new declaration; for it is by no means invalidated by his change of state.

Of the Fictitious Military Peculium.

VI. We must here make it known, that, since the ancient laws, as well as the latter constitutions, have, in imitation of the *peculia castrensia*, or military estates, given to some persons *peculia quasi castrensia*, or *quasi* military estates, and have indulged some of these in the liberty of making testaments, whilst they were under power, we therefore, extending this privilege still farther, have by our ordinance permitted all persons who possess these estates, to make their testaments, on condition that they observe the common solemnities of the law. But whoever thoroughly inspects our constitution, will have an opportunity of informing himself of every point which relates to the before-mentioned privilege.

TITLE XII.

Who cannot make a Will,

Of the Sons of a Family.

The right of making a testament with effect is not granted to all persons alike: for those, who are under the power of others, have not this right: insomuch that, although parents have given permission, their children will not be the more enabled by it to make a testament legally valid; if we except such, whom we have already mentioned, and principally those, who, on account of their being in the army, have permission, by virtue of our constitutions, to dispose by testament of whatever they have acquired by military service, although they are still under the power of their parents. This permission was at first granted by *Augustus*, *Nerva*, and that excellent prince *Trajan*, to actual soldiers only; but afterwards it was extended by the emperor *Adrian* to the veteran, that is, to those who had received their dismission: and therefore, if the son of a family bequeaths his *castrensian* or military estate, it will pass to him who is instituted the heir; but, if such son dies intestate without children or brothers, his estate will then pass of common right to his father, or other paternal ascendants. We may from hence infer, that

whatever a soldier, although under power, hath acquired by military service, it cannot be taken from him even by his father; and that the creditors of the father can neither sell it, or otherwise disturb the son in his possession; and that what is thus acquired is not liable to be shared in common with brothers, upon the demise of the father; but that it remains the sole property of him who acquired it: although by the civil law the *peculia* or estates of those, who are under power, are reckoned among the wealth of their parents; in the same manner as the *peculium* of a slave is esteemed the property of his master. But those estates must be excepted, which by the constitutions of the emperors, and chiefly by our own, are prohibited for diverse reasons to be acquired for parents. Upon the whole, if the son of a family, who is neither possessed of a military or *quasi*-military estate, makes a testament, it will not be valid, even although he is afterwards emancipated, and becomes *sui juris* before his death.

Of Persons below the age of Puberty and Madmen.

I. A person, within the age of puberty, can by no means make a good testament; because he is not supposed to possess that judgment of mind, which is requisite: and the same holds true of a madman, inasmuch as he is deprived of his senses. And the testament of a minor under puberty will not become valid, although he arrives at puberty before his death; neither will the testament of a madman become valid, although he afterwards regains his senses, and then dies. But, if he makes his testament, during a lucid interval, he is a legal testator; since it is certain, that the testament, which a man hath made, before the malady of madness has seized upon him, is good: for a subsequent fit of phrensy can neither destroy the force of a regular testament, nor the validity of any other transaction, in which the rules of the law have been punctually observed.

Of Prodigals.

II. A prodigal also, who is under an interdiction, and prohibited from having the management of his own affairs, can not make a testament: but, if he hath bequeathed his estate before interdiction, his testament will be valid.

Of the Deaf and Dumb.

III. A man deaf and dumb is not always capable of making a testament: but we would be understood to mean this of him, who is so deaf as to be unable to hear at all, and not of him, who is afflicted only with a thickness of hearing; and of him, who is so dumb, as to be totally deprived of utterance, and not of him,

who only labors under a difficulty of speech: for it often happens, that the most literate persons lose the faculty of hearing and speaking by various misfortunes; we have therefore published a constitution, which aids all such persons; so that in certain cases they may make testaments, if they observe the rules of our ordinance, and may do many other acts, which are there permitted. But, if any man, after making his testament, becomes either deaf or mute by reason of ill health or any other accident, his testament will notwithstanding this remain good.

Of the Blind.

IV. A blind man is not allowed to have the power of making a testament, unless he observes those rules, which the law of the emperor *Justin*, our father, has introduced.

Of Captives.

V. The testament of him, who is in the hand of an enemy, is not valid, if it was made during his captivity; even although he lives to return. But a testament, made by a man in the city, or before captivity, is good, either by virtue of the *jus postliminii*, if the prisoner returns; or by virtue of the law *Cornelia*, if he dies a captive.

TITLE XIII.

Of the Disinheriting of Children.

Antient Law.

THE solemnities of law, which we have before explained, are not alone sufficient to make a testament valid. For he, who has a son under his power, should take care either to institute him his heir, or to disinherit him nominally: for, if a father, in his testament, pretermits or passes over his son in silence, the testament will have no effect. And even if the son dies, living the father, yet no one can take upon himself the heirship by virtue of that testament, inasmuch as it was null from the very beginning. But the antients did not observe this rule in regard to daughters and grand-children of either sex, though descended from the male line; for although these were neither instituted heirs, nor disinherited, yet the testament was not invalidated; because a right of accretion intitled them to a certain portion of the inheritance: parents were therefore not necessitated to disinherit these children nominally, but might do it *inter cæteros*. A child is nominally disinherited, if the words of the will are, *let Titius my son be disinherited*; or even thus——*let my son be disinherited*, without the addition of any proper name, on supposition, that the testator had no other son living.

Of Posthumous Children.

I. Also posthumous children should either be instituted heirs, or disinherited; and in this the condition of all children is equal; but, if a posthumous son, or any posthumous descendent in the right line, whether male or female, is pretermitted in a testament, such testament will nevertheless be valid at the time of making; but, by the subsequent birth of a child of either sex, it will be annulled. And therefore, if a matron, from whom there is reason to expect a posthumous child, should miscarry, nothing can prevent the written heirs from entering upon the inheritance. But female posthumous children may be either nominally disinherited, or *inter cæteros* by a general clause; yet, if they are disinherited *inter cæteros*, something must be left them to shew, that they were not omitted through forgetfulness. But male posthumous children, *i. e.* sons, and their descendents in the direct line, cannot be disinherited otherwise, than nominally in this form—— *whatever son is hereafter born to me, I disinherit him.*

Of Children as it were Posthumous.

II. Those also are reckoned in the place of posthumous children, who, succeeding in the stead of proper heirs, become, by a *quasi*-birth, proper heirs to their parents: for example, if *Titius* has a son under his power, and by him a grandson, or grand-daughter, then would the son, because he is first in degree, have the sole right of a proper heir, although the grandson, or grand-daughter by that son, is under the same parental power. But, if the son of *Titius* should die in his father's life-time, or should by any other means cease to be under his father's power, the grandson or grand-daughter would succeed in his place, and would thus, by what may be called a *quasi*-birth, obtain the right of a proper heir. Therefore, as it behoves a testator for his own security, either to institute or disinherit his son, lest his testament should be deemed not legal, so it is equally necessary for him either to institute or disinherit his grandson or grand-daughter by that son, lest, if his son should die in his (the testator's) life-time, his grandson or grand-daughter, succeeding to the place of his son, should make void his testament by a *quasi*-agnation. And this has been introduced by the law *Julia Vellia*, in which is set forth a form of disinheriting *quasi*-posthumous children, similar to that of disinheriting posthumous children.

Of Emancipated Children.

III. In regard to emancipated children, the *civil law* does not make it necessary, either to institute them heirs or to disinherit them in a testament; inasmuch as they are not *sui hæredes*, i. e.

proper heirs. But the prætor commands, that all children in general, whether male or female, if they are not instituted heirs, shall be disinherited; the males nominally; the females *inter cæteros:* for, if children have neither been instituted heirs, nor properly disinherited in the manner, which we have mentioned, the prætor gives them the possession of the goods, contrary to the disposition of the testament.

Of Adopted Children.

IV. Adopted children, as long as they continue under the power of their adoptive father, are intitled to the same rights, as children born in lawful matrimony: and therefore they must either be instituted heirs, or disinherited, according to the rules laid down in regard to natural and lawful children. But it is neither enacted by the civil law, nor enjoined by prætorian equity, that children emancipated by an adoptive father, should be numbered among his natural children, so as to partake of their rights: whence it happens, that adopted children, as long as they continue in adoption, are reputed strangers to their natural parents, who are not necessitated either to institute them heirs, or to disinherit them: but, when they are emancipated by their adoptive father, they are then in the same state, in which they would have been, if they had been emancipated by their natural father.

New Law.

V. These were the rules, which the antient lawyers introduced. But we (not thinking, that any distinction can reasonably be made between the two sexes, inasmuch as they both contribute alike to the procreation of the species, and because, by the antient law of the twelve tables, all children, male as well as female, were equally called to the succession *ab intestato*, which law the prætors seem afterwards to have followed) have by our constitution introduced the same law in regard both to sons and daughters, and to all the other descendents in the male line, whether in being, or posthumous; so that all children, whether they are proper heirs or emancipated, must either be instituted heirs or nominally disinherited. And, in regard to adopted children, we have introduced certain regulations, which are contained in our constitution of adoptions.

Of the Testament of a Soldier.

VI. If a soldier makes his testament, whilst he is upon a military expedition, and neither nominally disinherits his children already born, nor his posthumous children, but passes them over in silence, although it is known to him, that he has such children, or that his wife was enceinte, it is provided by the constitutions of the emperors, that such silence shall be of equal force with a nominal disinherison.

Of the Testament of a Mother or maternal Grand-father.

VII. Neither a mother, nor a grandfather on the mother's side, is under any necessity of either instituting their children heirs, or of disinheriting them, but may pass them by in silence; for the silence of a mother, a maternal grandfather, and of all other ascendents on the mother's side, works the same effect, as an actual disinherison by a father. For a mother is not obliged to disinherit her children, if she does not think proper to institute them her heirs; neither is a maternal grandfather under a necessity either of instituting or disinheriting his grandson or grand-daughter by a daughter; inasmuch as this is not required either by the civil law, or the edict of the prætor, which gives the possession of goods *contra tabulas* (i. e. contrary to the disposition of the testament) to those children, who have been passed over in silence. But children, in this case, are not without a remedy against the testament of their mother or maternal grandfather, which shall be shewed hereafter.

TITLE XIV.

Of appointing Heirs.

Who may be appointed Heirs.

A man may appoint slaves, as well as freemen, to be his heirs by testament; and may nominate the slaves of another as well as his own: yet, according to the opinion of many, no master could formerly institute his own slaves to be his heirs, without giving them their liberty: but, at present, by virtue of our constitution, masters may appoint their proper slaves to be their heirs, without making even any mention of liberty: and this we have introduced, not for the sake of innovation, but because it seemed most just; and because *Paulus*, in his commentaries upon *Sabinus* and *Plautius*, affirms, that this was also the opinion of *Atilicinus*. Here note, that we call a slave *proprius servus*, if the testator had only a nude property in him, the usufruct being in another. But, in a constitution of the emperors *Severus* and *Antoninus*, there is a case, in which a slave was not permitted to be instituted an heir by his owner, although his liberty was expressly given to him. The words of the constitution are these——*It is consonant to right reason, that no slave, accused of adultery with his mistress, shall be allowed, before a sentence of acquital, to be made free by that mistress, who is alleged to be a partner in the crime.* It therefore follows, that, if a mistress institutes such a slave to be her heir, the institution is of no avail.——The expression *alienus servus* (i. e. *the slave of another*,) is also sometimes used to denote him, of whom the testator had the usufruct, though not the property.

Of Slaves appointed Heirs.

I. When a slave hath been instituted by his master, and remains in the same state, he will obtain his freedom at the death of his master, by virtue of the testament, and become his necessary heir. But, if that slave is manumitted in the life-time of his master, it is in his power either to accept or refuse the inheritance; for he will not become a necessary heir, as he can not be said to have obtained both his liberty and the inheritance, by virtue of the testament. But, if such instituted heir should be aliened, he can not then enter upon the inheritance but at the command of his new master, who by means of his slave may become the heir of the testator. For a slave, who hath been aliened, can not afterwards obtain his liberty, or take an inheritance to his own use, by virtue of the testament of that master, who made the alienation, although his freedom was expressly given by such testament: because a master, who has aliened his slave, seems to have departed from having any intention to infranchise him. And, when the slave of another is appointed an heir, but remains in the same condition, he can not take the inheritance, but by his master's order; and, if the slave is aliened in the lifetime of the testator, or even after his death, at any time before he has actually taken the inheritance, he must then either accept, or refuse it, at the command of his new master. But, if the slave is infranchised, living the testator, or after his death, before he has accepted the heirship, he either may, or may not, enter upon the inheritance at his own option.

Of Slaves become Heirs.

II. The slave of another may legally be instituted an heir, after the death of his master; for the slaves of an inheritance, not entered upon, are intitled to the *factio passiva testamenti*, i. e. are capable of taking, though not of giving, by testament; and the reason of this is, because an inheritance, which is open, and not as yet entered upon, is supposed to represent the person of the deceased, and not the person of the future heir: and thus the slave even of a child in the womb may be constituted an heir.

Of the Slave of many Masters.

III. If the slave of many masters, who are all capable of taking by testament, is instituted an heir by a stranger, then that slave acquires a part of the inheritance for each master, who commanded him to take it, according to their several proportions of property.

Of a Plurality of Heirs.

IV. A testator may appoint one heir, or as many heirs as he pleases *in infinitum*.

Of the Division of an Inheritance.

V. An inheritance is generally divided into twelve *unciæ*, that is, parts or ounces, all which are comprehended under one total, termed an As: and each of these parts, from the *uncia* to the As, has it's peculiar name; viz.

Sextans——a sixth part, or two ounces.
Quadrans——a fourth, or three ounces.
Triens——a third, or four ounces.
Qnincunx——five ounces.
Semis——a moity, or six ounces.
Septunx——seven ounces.
Bes——two thirds, or 8 ounces; *quasi bis triens.*
Dodrans——nine ounces, or three fourths; *quasi, dempto quadrante, As.*
Dextans——ten ounces; *quasi, dempto sextante, As.*
Deunx——eleven ounces out of twelve; *quasi, demptâ unciâ, As.*

But it is not necessary, that an *As*, or *total*, should always be divided into twelve parts; for an *As* may consist of what parts the testator pleases; and, if a man names but one heir, and appoints him *ex semisse, i. e.* the heir of six parts; yet the whole *As* will be included; for no man can die partly testate and partly intestate, except a soldier, whose intention is solely to be regarded. And a testator may also divide his estate into as many parts, as he thinks convenient.

Of the respective Portions.

VI. When a testator hath instituted many heirs, it is incumbent upon him to make a division of his effects, if he does not intend, that all his heirs should share his inheritance in equal portions: for, if no distribution is made by the testator, it is evident, that all his heirs must be equal sharers. But if the shares of some of the nominated heirs in a testament should be expressed, and the share or shares of one or more should be omitted, then he or they, whose share or shares had not been specified, would be intitled to the undisposed remainder of the inheritance. But, if a whole *As*, or inheritance, is given among some of the nominated heirs, yet they, whose shares are mentioned, are intitled only to a moity; and he or they, whose shares are not mentioned, are called to the succession of the other moity. And, when a whole inheritance is not given away, it is immaterial whether an heir, whose share is not specified, holds the first, middle, or last place in the nomination: for, whatever place he holds in it, he is equally intitled to the part not bequeathed in the testament.

If any part remain unbequeathed.

VII. Let us now inquire, what the law would direct, if a part of an inheritance should remain unbequeathed, and yet a certain portion of it should be given by testament to every nominated heir: as if three should be instituted, and a fourth given to each. It is clear in this case, that the undisposed part would vest in each of them in proportion to the share bequeathed to him, and that each would be reputed the written heir of a third. And, on the contrary, if many are nominated heirs in certain portions, so as to exceed the *As*, then each heir must suffer a defalcation *pro ratâ* ——for example, if four are instituted, and a third is given to each, then this disposition would work the same effect, as if each of the written heirs had been instituted to a fourth only.

If more portions than twelve are bequeathed.

VIII. If more parts or ounces, than twelve, are bequeathed, then he, who is instituted without any prescribed share, shall be intitled to what remains, of a *dupondius;* that is, of twenty-four parts: and, if more than twenty-four parts are bequeathed, then the heir, who is nominated without any determinate share, is intitled to the remainder of a *tripondius*, *i. e.* of thirty-six parts or ounces. But all these parts are afterwards reduced to twelve.

Of the manner of instituting an Heir.

IX. An heir may be constituted simply, or conditionally——but not *from* or *to* any certain period: as if a testator should say to *Titius, be thou my heir after five years* to be computed *from my death*——or——*from the calends of such a month*——or——*'till the calends of such a month.* For time, thus added, is in law deemed superfluous; and such an institution takes place immediately, as if it was a simple appointment.

Of an impossible Condition.

X. An impossible condition in the institution of heirs, the disposition of legacies, the appointment of trusts, or the confering of liberty, is treated as unwritten or void.

Of more Conditions.

XI. If many conditions are jointly required in the institution of an heir; as thus, *if this thing* and *that thing be done*, then both must be complied with. But, if the conditions are placed separately and in the disjunctive, as thus, *if this*, or *that be done*, it will then be sufficient to obey either.

Of Strangers to the Testator.

XII. A testator may appoint persons, whom he hath never seen, to be his heirs. He may, for example, institute his brother's

sons, who are in a foreign country, although he does not know where they are; for the want of this knowledge in a testator will not vitiate the institution of an heir.

TITLE XV.

Of Vulgar Substitution.

Of Heirs of different Degrees.

A man by testament may appoint many degrees of heirs; as thus —— *if* Titius *will not be my heir, let* Seius *be my heir.* And he may proceed in such a substitution as far as he shall think proper; and lastly, in default of all others, he may constitute a slave to be his necessary heir.

Of the number of Heirs in different Degrees.

I. A testator may substitute many in the place of one, or one in the place of many, or one in the place of each, or he may substitute even his instituted heirs reciprocally to one another.

Of the Portions of the Substitutes.

II. If a testator, having instituted several co-heirs in unequal portions, substitutes them reciprocally the one to the other, and makes no mention of their shares of the inheritance in the substitution, he seems to have given the same shares by the substitution, which he gave by the institution; and this is agreeable to the rescript of the emperor *Antoninus.*

Of a Co-heir substituted.

III. If a co-heir is substituted to an instituted heir, and a third person is substituted to that co-heir, the emperors *Severus* and *Antoninus*, have by rescript ordained, that such substituted person shall be admitted to the portions of both the co-heirs without distinction.

Of the Substitute to a Slave.

IV. If a testator constitutes the slave of another to be his heir, supposing him to be free, and adds——*if he does not become my heir, I substitute* Mævius *in his place*——then, if that *slave* should afterwards enter upon the inheritance at the command of his master, *Mævius*, the substitute, would be admitted to a moity. For the words, *if he does not become my heir*, in regard to him, whom the testator knew to be under the dominion of another, are taken to mean, if he will neither become my heir himself, nor cause another to be my heir: but in regard to him, whom the testator supposed to be free, they imply this condition; viz. if my heir will neither acquire the inheritance for himself, nor for him to whose dominion he may afterwards become subject. But it

was determined by *Tiberius*, the emperor, in the case of his own slave *Parthenius*, that a substitute in such a case should be admitted to a moity.

TITLE XVI.

Of Pupillary Substitution.

Summary.

A parent can substitute to his children, who are within puberty, and under his power, not only in the manner before mentioned, which is thus "——if my children will not be my heirs, let some other person be my heir——*but he may write*——if my children actually become my heirs, but die within puberty, let another become their heir: *for example:* let *Titius*, my son, be my heir; and, if he either does not, or does, become my heir, and dies before he ceases to be under tutelage, [*i. e.* before he arrives at the age of puberty,] *let* Seius *be my heir.*" And, in this case, if the son does not enter upon the inheritance, the substitute becomes heir to the father; and, if the son takes the inheritance, and dies a pupil before the age of puberty, the substitute is then heir to the son. For custom has ordained, that parents may make wills for their children, when their children are not at age to make wills for themselves.

Of Substitution for Insanes.

I. Excited by humanity, and the reasonableness of the foregoing usage, we have inserted a constitution into our Code, by which it is provided, that, if a man has children, grand-children, or great-grand-children, who are mad or disordered in their senses, he may make a substitution of certain persons to such children, in the manner of a pupillary substitution, although they are arrived at the age of full puberty. But we have decreed, that this species of substitution shall be void, as soon as they shall have recovered from their disorder; and this we have done in imitation of pupillary substitution, which ceases to be in force, when the minor attains to puberty.

The property of Pupillary Substitutes.

II. In a pupillary substitution, made after the form beforementioned, there are in a manner two testaments, the one of the father, the other of the son; as if the son had instituted an heir for himself: at least there is in such a substitution, one testament containing a disposition of two inheritances.

Another Form.

III. If a testator is apprehensive, lest, at the time of his death, his son, being as yet a pupil, should be liable to fraud and imposi-

tion, if a substitute should be publicly given to him, he ought to insert a vulgar substitution in the first tablet of his testament; and to write that substitution, in which a substitute is named, *if his son should die within puberty*, in the lower tablet, which ought to be separately tied up and sealed; and it also behoves the testator to insert a clause in the first part of his testament, forbidding the lower part to be opened, whilst his son is alive, and within the age of puberty. But, although it is certain, that a substitution to a son within puberty is not less valid, because it is written on the same tablet, in which the testator hath appointed him to be his heir, it is however unsafe and dangerous.

Who may Substitute.

IV. Parents are not only allowed to give a substitute to their children within puberty, if such children become their heirs, and die within puberty; but parents are also permitted to give a substitute to their disinherited children; and therefore, whatever a disinherited child, within the age of puberty, may have acquired by inheritances, by legacies, or by the gift of relations and friends, the whole will become the property of the substitute. All, which we have hitherto said concerning the substitution of pupils, whether they are instituted heirs, or disinherited children, is understood to extend also to posthumous children.

Pupillary Testament.

V. No parent can make a testament for his children, unless he hath made a testament for himself: for the testament of a child within puberty is a part and consequence of the testament of the parent, insomuch that, if the testament of the father is not valid, the testament of the son will not take effect.

Each Child may have a Substitute.

VI. A parent may make a pupillary substitution to each of his children, or to him, who shall die the last within puberty. He may substitute to each of his children, if he is unwilling, that any of them should die intestate; and he may substitute to the last, who shall die within puberty, if he is willing, that they should preserve among themselves the intire right of succession.

Nominal or general Substitution.

VII. A substitution may be made to a child within puberty, either nominally; as for example "——If my son becomes my heir, and dies a pupil, let TITIUS be my heir;——*or generally thus*——Whoever shall be my heir, let the same person be a substitute to my son, if he dies within puberty." And, by these general words, all, who have been instituted, and have taken upon

them the inheritance of the father, must be called, by virtue of the substitution, to the inheritance of the son, if he dies within puberty; each being intitled to a part of the son's inheritance, in proportion to the share, which he had in the father's.

How Pupillary Substitution is finished.

VIII. A pupillary substitution may be made to males, till they arrive at fourteen complete; and to females, till they have completed their twelfth year: and, when they exceed either of these ages, the substitution becomes extinct.

Who cannot receive a pupillary Substitution.

IX. A pupillary substitution cannot be made with effect, either to a stranger, who is instituted, or even to a son who is instituted, if his age exceeds that of puberty. But a testator may oblige his heir to give to another either a part, or even the whole of the inheritance, by virtue of a *fidei-commissum*, or gift in trust; which we will treat of in it's proper place.

TITLE XVII.

How Testaments are dissolved.

A TESTAMENT, legally made, remains valid, until it is either broken, or rendered ineffectual.

How Testaments are broken. First by Adoption.

I. A testament is said to be broken, or revoked, when the force of it is destroyed, whilst the testator still remains in the same state. For, if a testator, after making his testament, should arrogate an independent person, by licence from the emperor, or, in the presence of the prætor, should adopt a child under the power of his natural parent, by virtue of our constitution, then that testament would be broken by this *quasi*-birth of a proper heir.

Of Posterior Testaments.

II. A former testament, although legally perfect, may be broken or revoked by a subsequent testament; nor is it material, whether the heir, nominated in the later testament, can or will take the heirship at the death of the testator; for the only thing regarded is, whether he might have been the heir: and therefore, if an instituted heir should refuse to take the heirship, or should die, living the testator, or after his death, and before he could enter upon the inheritance; or if he should die, before the condition is accomplished, upon which he was instituted, then, in any of these cases, the testator would die intestate; for the first testament would be invalid, being broken or revoked by the second, and the second would be of as little force, for want of an heir.

Of other Posterior Testaments.

III. If a man, who has already made a testament legally perfect, should make a subsequent testament equally good, and institute an heir in it to some particular things only, the emperors *Severus* and *Antoninus* have by rescript declared, that, in this case, the first will shall be broken or revoked, as a testament. But we have commanded the words of this constitution to be here inserted. The emperors *Severus* and *Antoninus* to *Cocceius Campanus* "We determine, that a second testament, although the heir named in it is not universal, but instituted to particular things only, shall be as good in law, as if no mention had been made of particular things; yet it is not to be doubted, but that the written heir shall be obliged to content himself either with the things given him, or with the fourth part, allowed by the *Falcidian* law, and shall be bound to restore the rest of the inheritance to the heirs instituted in the first testament, on account of the words, denoting a trust, inserted in the second testament, by which words it is expressly declared, that the first testament shall subsist."——And, in this manner, a testament may be said to be broken or cancelled.

Of invalidated Testaments.

IV. Testaments, legally made, are also invalidated, if the testator suffers diminution, that is, changes his condition: and, in the first book of our institutions, we have shewed by what means diminution, or a change of state, may happen.

Why so termed.

V. In the case of diminution, testaments are said to become *irrita*, i. e. ineffectual, although those, which are broken or revoked, and those, which, from the beginning, were not legal, do all equally become ineffectual (or *irrita*) in reality. We may also term those testaments broken, which are at first legally made, but are afterwards rendered ineffectual, by diminution, or change of state. But, as it is proper, that every particular defect should be distinguished by a particular appellation, those testaments, which are illegal, are termed *null*;——those which were at first legal, but afterwards lose their force, by some revocatory act of the testator, are said to be *rupta*, or broken; and those, since the making of which, the testator hath suffered a change of state, are said to be *irrita*, or ineffectual.

How they may be restored.

VI. But a testament, which was at first legally made, and hath afterwards been rendered void by diminution, is not always without effect; for the written heir is intitled to the possession of

the goods, by virtue of the testament, if it appears, that it was sealed by seven witnesses, and that the testator was a *Roman* citizen, and not under power, at the time of his death: but, if a testament became void, because the testator had lost the right of a citizen, or his liberty, or had given himself in adoption, and, at the time of his death, still continued under the power of his adoptive father, then the written heir could not demand the possession of the goods, in consequence of the testament.

Of the mere Will (nuda Voluntas.)

VII. A testament can not be invalidated solely, because the testator was afterwards unwilling, that it should subsist; so that, if a man, after making one testament, should begin another, and by reason of death, or change of mind, should not proceed to perfect that testament, it is provided by the oration or ordinance of the emperor *Pertinax*, that the first testament shall not be revoked, unless the second is both legal and perfect; for an imperfect testament is undoubtedly null.

Deficient Wills.

VIII. The emperor *Pertinax* hath declared by the same ordinance, that he would not take the inheritance of any testator, who left him his heir, because a law-suit was depending;——that he would never establish a will, deficient in point of form, if he was upon that account instituted the heir;——that he would by no means suffer himself to be nominated an heir by the mere word of mouth of a testator; and that he would never take any emolument by virtue of any writing whatever, not authorised by the strict rules of law. The emperors *Severus* and *Antoninus* have also often issued rescripts to the same purpose: "for although" say they, "we are certainly not subject to the laws, yet we live in obedience to them."

TITLE XVIII.

Of Inofficious Wills.

Reason of this Complaint.

INASMUCH as parents often disinherit their children without cause, or omit to mention them in their testaments, it has therefore been introduced as law, that children, who have been unjustly disinherited, or unjustly omitted in the testaments of their parents, may complain that such testaments are inofficious, under color that their parents were not of sane mind, when they made them: but, in these cases, it is not averred to be strictly true, that the testator was really mad or disordered in his senses, but it is urged as a mere fic-

tion only; for the testament is acknowledged to have been well made, and the only exception to it is, that the testament is not consistent with the duty of a parent. For, if a testator was really not in his senses at the time of making his testament, it is certainly null.

Who may lawfully complain.

I. Children are not the only persons allowed to complain, that testaments are inofficious; for parents are in like manner permitted to make the same complaint. Also the brothers and sisters of a testator are, by virtue of the imperial constitutions, prefered to infamous persons, if any such have been instituted by the deceased to be his heirs; but brothers and sisters are not therefore allowed to make a complaint against *any* heir, whom the testator shall have instituted. And collaterals, beyond brothers and sisters, can by no means complain of the undutifulness of a testament, if their right to complain is opposed; but if their right of complaining is not disputed, and the testament is annulled, yet those only can be benefited, who are nearest in succession upon an intestacy.

Adopted Children.

II. Adopted children, according to the distinction taken in our constitution, are admitted, as well as natural children, to complain against a testament, as inofficious, if they can obtain the effects of the deceased no other way; but if they can get the whole or a part of the inheritance by any other means, they then can not bring a complaint of undutifulness against the testament. Posthumous children also, who are unable to recover their inheritance by any other method, are allowed to bring this complaint.

If the Testator has left any Thing.

III. What we have hitherto said must be understood to take place only, when nothing has been left by the will of the deceased; for, if any single thing, or the least part of an inheritance, hath been bequeathed to those, who have a right to a fourth part or legitime portion of the testator's estate, they are barred from bringing a querele or complaint against the testament, as undutiful, but are intitled by action to recover whatever sum is wanting to complete their legitime, although it was not added by the testator, "that their legitime portion should be completed according to the arbitration of some person of an approved character."

Of a Legacy to the Tutor.

IV. If a tutor should accept a legacy in the name of his pupil, in consequence of a bequest made in the testament of such tutor's father, who left nothing to his son; the tutor may nevertheless complain in his own name against the testament of his father as undutiful.

V. And, on the contrary, if a tutor should bring a complaint of undutifulness in the name of his pupil, against the testament of his pupil's father, who left nothing to his son, and this testament should be confirmed by sentence, yet the tutor would not afterwards be barred, on account of this proceeding, from taking whatever was left him in that testament, which he controverted only for the benefit of his pupil and by virtue of his office.

Of the fourth or legitime Part.

VI. No person, who hath right, can be hindered from bringing a complaint of undutiulness unless he hath in some manner received his fourth or legitime part, as by being appointed heir, by having a legacy, or by means of a trust for his use; or unless his legitime part hath been given him by donation *propter mortem*, or even *inter vivos*, (in those cases, of which our constitution makes mention,) or by any other means set forth in our ordinances. What we have said of the fourth or legitime is to be so understood, that, if there are more persons than one, who have a right to bring a plaint of undutifulness against a testament, yet one fourth will be sufficient, divided among them all in equal portions.

TITLE XIX.

Of the Quality and Difference of Inheritances.

Division of Heirs.

HEIRS are divided into three sorts, called *proper*; *proper* and *necessary*; and *strangers*.

Of necessary Heirs.

I. A slave, instituted by his master, is a necesary heir; and he is so called, because at the death of the testator he becomes instantly free, and is compellable to take the heirship; he therefore, who suspects his circumstances, commonly institutes his slave to be his heir in the first, second, or some other place; so that, if he does not leave a sum equal to his debts, the goods, which are seized, sold, or divided among his creditors, may rather seem to be those of his heir than his own. But a slave, in recompense of this dishonour, is allowed to reserve to himself whatever he hath acquired after the death of his patron; for such acquisitions are not to be sold, although the goods of the deceased are ever so insufficient for the payment of his creditors.

Of proper Heirs.

II. Proper and necessary heirs are sons, daughters, grandsons or grand-daughters by a son or any other descendents in the direct line, who were in the power of the deceased at the time of his

death. But, in order to constitute grandchildren proper or domestic heirs, it does not suffice, that they were in the power of their grandfather at the time of his decease; but it is requisite, that their father should have ceased to be a proper heir in the life-time of his father, by having been freed, either by death or some other means, from paternal authority; for then it is, that the grandson or grand-daughter succeeds in the place of their father. And note, that heirs are called *sui* or proper, because they are domestic; and in the very life-time of their father are reputed masters or proprietors of the inheritance in a certain degree. Hence it is, that, if a man dies intestate, his children are preferred before all others to the succession; and are called necessary heirs, because, willing or unwilling, they become the heirs of their parent according to the law of the 12 tables, either by virtue of a testament or in consequence of an intestacy. But, when children request it, the prætor permits them to abstain from the inheritance, that the effects of their parents, rather than their own, may be seized by the creditors.

Of Strangers.

III. But all other heirs, not subject to the power of the testator at the time of his death, are called strangers: thus even children, who are not under the power of their father, but yet are constituted his heirs, are reckoned strangers in a legal sense: and, for the same reason, children, instituted heirs by their mother, are also reputed strangers; for a woman is not allowed to have her children under her own power. A slave also, whom his master hath instituted by testament and afterwards manumitted, is numbered among those heirs, who are called strangers.

Of the Faction of a Testament.

IV. In regard to strangers, it is requisite, that they should be capable of the faction of a testament, whether they are instituted heirs themselves, or whether those, under their power, are instituted. And this qualification is required at two several times;—at the time of making the testament, that the institution may be valid; and at the time of the testator's death, that such institution may take effect: and farther, whether an heir is appointed simply or conditionally, yet he ought to be capable of the faction of a testament at the time of entering upon the inheritance; for his right is principally regarded at the time of acquiring the possession. But, in the intermediate time, between the making of the testament and the death of the testator, or the completion of the condition of the institution, the heir will not be prejudiced by incapacity or change of state; because the three particular times,

which we have mentioned, are the times to be regarded. But a man, capable of giving his effects by testament, is not the only person, who is said to have *testamenti factionem*; for whoever is capable of taking for the benefit of himself, or of acquiring by testament for the benefit of another, is also understood to have the faction of a testament: and therefore persons mad, mute, or posthumous, also infants, the sons of a family, or slaves not your own, may all be said to have the faction of a testament in its passive signification. For, although such persons are incapable of making a testament, yet they are capable of acquiring by testament, either for themselves or others.

Of the Right of deliberating.

V. Strangers, who are appointed heirs, have the power of deliberating whether they will, or will not, enter upon an inheritance. But, if even a proper or domestic heir, who has the liberty of abstaining, should intermeddle, or, if a stranger, who is permitted to deliberate, should once take an inheritance, it will not afterwards be in his power to renounce it, unless he was under the age of 25 years: for the prætor, who in all other cases relieves minors, who have been deceived, affords them also his assistance, when they rashly take upon themselves an injurious inheritance. And here it must be noted, that the emperor *Adrian* once gave permission to a major, or person of full age, to relinquish an inheritance, when it appeared to be incumbered with a great debt, which had been concealed, till the heir had taken upon himself the administration. But this permission was granted as a very special instance of beneficence. The emperor *Gordian* afterwards promulged a constitution for the indemnification of heirs, yet confined the force of it to those only who were of the soldiery. But our extended benevolence hath rendered this benefit common to all our subjects in general, having dictated a constitution both just and noble, which, if heirs will strictly observe, they may enter upon their inheritance, and not be made farther chargeable than the value of the estate will extend; so that they are under no necessity of praying a time for deliberation, unless they omit to observe the tenor of our ordinance, chusing rather to deliberate and submit themselves to the danger attending the acceptance of an inheritance according to the antient law.

Of acquiring or losing the Inheritance.

VI. A stranger, who is instituted by testament, or called by law to take a succession in case of an intestacy, may make himself accountable as heir, either by doing some act as such, or by barely signifying his acceptance of the worship. And a man is

deemed to act as the heir of an inheritance, if he treats it as his own, by selling any part of it, by cultivating the ground, or by tilling it; or even if he declares his consent to accept it in any manner, either by act or speech; when he knows, at the same time, that the person, with whose estate he intermeddles, is dead testate or intestate, and that he himself is the heir: for to act as heir is to act as proprietor; and the antients frequently used the term heir, when they would denote the proprietor of an estate. But as a stranger may become an heir by a bare consent only, so on the contrary, by a mere dissent, he may bar himself from an an inheritance. And nothing prevents, but that a person, who was born deaf and dumb, or became so by accident, may, by acting as heir, either acquire the advantages, or bring upon himself the disadvantages of an inheritance, if he was sensible of what he was doing, and that he was acting in the capacity of an heir.

TITLE XX.

Of Legacies.

Continuation.

AFTER what has been said, we will make some observations upon the doctrine of legacies; although a discussion of this part of the law may not seem exactly to fall in with the subject proposed; for we are treating only of those legal methods, by which things may be acquired universally: but, as we have already spoken at large of testaments and testamentary heirs, it is not without reason, that we intend to treat of legacies in the following paragraphs.

Definition.

I. A legacy is a species of donation, which is left or ordered by the deceased; and, if possible, must be performed by his heir.

Of the antient Kinds of Legacies.

II. Antiently there were four kinds of legacies in use; namely—*per vindicationem—per damnationem—sinendi modo*—and *per præceptionem*. And to each of these was assigned a certain form of words, by which their different species were signified; but these fixed forms have been wholly taken away by the imperial ordinance of the later emperors, *Constantinus*, *Constantius*, and *Constans*. And we also being desirous that the wills of deceased persons might be corroborated, and that their intentions should be more regarded than their words, have, with great care and study, composed a constitution, which enacts, that the nature of

all legacies shall be the same; and that legataries, by whatever words they are constituted, may sue for what is left them, not only by a personal, but by a real or hypothecary action. But the reader may most perfectly comprehend the well weighed matter of this constitution by perusing the tenor of it.

Distinction of Legacies and Trusts.

III. But we have judged it expedient, that our constitution should not rest here, but extend still farther: for, when we observed, that the antients confined legacies within very strict rules, and yet were extremely favourable to gifts in trust, it was thought necessary to make all legacies equal to gifts in trust, that no difference in effect should remain between them; so that whatever is deficient in the nature of legacies may be supplied by the nature of trusts, and whatever is abundant in the nature of legacies may become an accretion to the nature of trusts.—But, that we may not raise difficulties, and perplex the minds of young persons at their entrance upon the study of the law, by explaining these things promiscuously, we have esteemed it worth our pains to treat separately, first of legacies, and afterwards of trusts, that, the nature of both being known, the student, thus instructed, may more easily understand their relation and intermixture.

Of the Subjects of a Legacy.

IV. A testator may not only bequeath his own property, or that of his heir, but also the property of others; and, if the thing bequeathed belongs to another, the heir can be obliged either to purchase and deliver it, or to render the value of it, if it cannot be purchased. But, if the thing bequeathed is not in commerce, and what the law will not permit to be purchased, the heir in this case can never be obliged to pay the value of it to the legatary; as if a man should bequeath to another the *Campus Martius*, the palaces of the prince, the temples, or any of those things, which appertain to the public: for such legacies can be of no moment or efficacy. But, when we said, that a testator might bequeath the goods of another man, we would be understood to mean, that this can be done only, if the deceased knew, that what he bequeathed belonged to another, and not, if he was ignorant of it; since, if he had known it, he probably would not have left such a legacy; and to this purpose is the rescript of the emperor *Antonius*. And it is incumbent upon the party, agent, or legatory to bring proof that the deceased knew, that what he left belonged to another; for the heir is by no means obliged to prove, that the deceased did not know it; because, by the general rule of law, the necessity of proving lies upon the complainant.

Of a pledged Thing.

V. If a man bequeaths a thing, which he hath pledged to a creditor, the heir is under a necessity of redeeming it: but in this case, as in the former, concerning the goods of another, the heir cannot be obliged to redeem the thing bequeathed, unless the deceased knew, that it was pledged; and this the emperors *Severus* and *Antoninus* have declared by their rescript. But nevertheless, whenever it appears to have been the express will of the deceased, that the legatary should himself redeem the thing left to him, then the heir is free from the obligation of doing it.

Of the Property of another acquired after the Will by a Legatee.

VI. If a thing bequeathed is the property of another, and the legatee becomes the proprietor of it in the life-time of the testator, it is necessary to be known by what means the legatee became the proprietor; for, if he bought it, he may nevertheless recover the price given, by an action in consequence of the testament; but, if he obtained it as a gift, or by any such lucrative title, no action will lie; for, it is a maxim, that two lucrative causes can never concur in the same person and thing. And therefore, if the same specific thing is left by two testaments to one and the same person, the question will be, when the legatary sues in virtue of one of the testaments, whether he hath obtained the thing itself, or the value of it, by virtue of the other? for, if he is already possessed of the thing itself, the suit is at an end, because he hath received it on a lucrative account; but, if he hath obtained the value of it only from the heir of one of the testators, he may bring an action for the thing itself, against the heir of the other.

Of Things which do not exist.

VII. Things, which do not exist, may be rightly bequeathed, if there is but a possibility, that they may exist: thus a man may devise the fruits, which shall grow on such a spot of ground; or the offspring, which shall be born of a particular slave.

Of a Legacy of the same thing to two.

VIII. When the same specific legacy is left to two persons either conjunctively or disjunctively, if they are both willing to accept it, it must be divided between them. But, if one of the legatees dies in the life-time of the testator, dislikes his legacy, or is by any means prevented from taking it, the whole vests in his co-legatee. A legacy thus worded is in the conjunctive, *I give and bequeath my slave* STICHUS *to* TITIUS *and* SEIUS:—but a legacy, worded as follows, is in the disjunctive—*I give and bequeath my slave* STICHUS *to* TITIUS: *I give and bequeath my*

slave STICHUS *to* SEIUS. And, although the testator should add, that he gives the *same slave* STICHUS *to* SEIUS, yet the legacy would nevertheless be understood to be left in the disjunctive.

IX. If a man hath bequeathed the ground of another, and the legatary hath purchased the property of that ground without the usufruct, which hath also afterwards accrued to him, it is said by *Julianus*, that the legatary may rightly bring an action by virtue of the testament, and demand the ground, because the usufruct is regarded as a service only. But it is the duty of a judge, in this case, to order the price of the property of the ground to be paid, the value of the usufruct being deducted.

Of the Property of the Legatee.

X. If a man bequeaths to another what already belongs to him, the legacy is ineffectual; for that, which is already the property of a legatee, can by no means become more so. And, although the legatee should, after the bequest, alien the thing bequeathed, neither the thing itself, nor even the value of it, would become due to him from the heir of the testator.

Of the Legacy of what is not your own.

XI. If a testator should bequeath what is his own, as if it was the property of another, the bequest would nevertheless be good; for truth is more prevalent than what is founded upon opinion only. But even suppose the testator to imagine, that what he bequeaths belongs already to the legatary, yet, if it does not, it is certain, that such a legacy would also be valid; because the will of the deceased can thus take effect.

Of the Alienation or Mortgage of a Legacy.

XII. But, if a testator bequeaths what is his own property, and afterwards aliens it, it is the opinion of CELSUS, that the thing bequeathed will nevertheless become due to the legatee, if the testator did not dispose of it, with an intention to oust him. The emperors *Severus* and *Antoninus* have published their rescript to this effect; and they have also signified by another rescript, that whoever has bequeathed a legacy, and hath afterwards pawned or mortgaged it, shall not be deemed to have retracted it; and that the legatee may therefore of course bring an action against the heir, and oblige him to redeem. And, if a testator shall have aliened but a part of the thing bequeathed, then all that part, which remains unaliened, is still due; and that, which is aliened, is only due, if it appears not to have been aliened by the testator with a design to retract the legacy.

Of the Legacy of a Discharge from Debt.

XIII. If a man bequeaths a discharge to his debtor, the bequest is effectual; and the heir can bring no suit against the debtor, or his heir, or any one, who represents him: but, on the contrary, the heir of the testator may be convened by the debtor, and obliged to give him his discharge. A man may also by testament command his heir not to sue a debtor, within a time limited.

Of a Legacy bequeathed to a Creditor.

XIV. On the contrary, if a debtor bequeaths by testament to his creditor the money, which he owes him, this legacy is ineffectual, if the value of the legacy amounts but merely to the value of the debt; for thus the creditor can receive no benefit from the legacy. But, if a debtor bequeaths simply to his creditor a sum of money, which was to be paid at a day certain, or which he owed upon condition, the legacy will take effect on account of the representation, *i. e.* on account of the immediate payment, the legacy becoming due before the debt.——But, according to PAPINIAN, if the day of payment should come, or the event of the condition happen in the life-time of the testator, the legacy would nevertheless be effectual, because it was once good; which is true. For we are by no means satisfied with the opinion of those, who imagine, that a legacy once good, may afterwards become extinct, by falling into a state, from which it could not have taken a legal commencement.

Of the Legacy of a Dower.

XIV. If a man gives back to his wife by legacy her marriage portion, the legacy is valid: for such a legacy is more beneficial to her than the action, which she might maintain for the recovery of her portion. But, if an husband bequeaths to his wife her marriage portion, and hath never actually received it, the emperors *Severus* and *Antoninus* have declared by their rescript, that, if it is left simply without any specification of a sum certain, the legacy is void; but that, if any certain sum, or thing is specified, or if the instruments, in which the exact value of the portion is mentioned, are referred to, the legacy is valid.

Of the destruction or change of the subject of a Legacy.

XVI. If a thing bequeathed should perish before delivery, otherwise than by the act or fault of the heir, the loss must fall upon the legatary. And, if the slave of another, who is bequeathed, shall be manumitted, and the heir hath not been privy to the manumission, he can be subject to no action. But, if a testator bequeaths the slave of his heir, who afterwards manumits that slave, it is the opinion of JULIAN, that the heir is answerable: nor is it at all material, whether he did or did not know of the

legacy. And also, if the heir hath made a present of a slave bequeathed, and the donee hath manumitted him, the heir is liable to an action, although he was ignorant of the bequest.

Of the Death of the Subjects of a Legacy.

XVII. If a testator gives by legacy his female slaves and their offspring, although the slaves die, yet their issue will become due to the legatary: and the same obtains, if ordinary slaves are bequeathed together with vicarial: for although the ordinary slaves die, yet the vicarial slaves will pass by virtue of the bequest. But, if a slave is bequeathed with his *peculium*, and afterwards dies, or is manumitted, or aliened, the legacy of the *peculium* becomes extinct. And the consequences will be the same, if a piece of ground is bequeathed with the instruments for improving it; for, if the testator aliens the ground, the legacy of the instruments of husbandry is of course extinguished.

Of the Legacy of a Flock.

XVIII. If a flock is bequeathed, and afterwards reduced to a single sheep, that sheep is claimable; and, if a flock receives an increase or addition, after it hath been disposed of by testament, the increase or addition will also, according to *Julian*, become due to the legatary. For a flock is deemed one body, consisting of separate members, as an house is reckoned one body, composed of materials, joined together and adhering.

Of the Legacy of Houses.

XIX. And lastly, when an house is bequeathed, the marble or pillars, which are added after the bequest is made, will pass under the general legacy.

Of the Peculium.

XX. When the *peculium* of a slave is bequeathed, it is certain, that the increase or decrease of it, in the life of the testator, becomes the loss or gain of the legatary. And, if the *peculium* of a slave is left to him together with his liberty, and such slave makes an acquisition to the *peculium*, subsequent to the death of the testator, and before the inheritance is entered upon, it is the opinion of *Julian*, that whatever is acquired within that period, will pass to him as the legatary; for such a legacy does not become due, but from the day of the acceptance of the inheritance. But it is the opinion of the same *Julian*, that, if the *peculium* of a slave is bequeathed to a stranger, an increase, acquired within the period above-mentioned, will not pass under the legacy, unless the acquisition was made, by means of something appertaining to the *peculium*; for the *peculium* of a slave does not belong to him,

after he is manumitted by testament, unless it is expressly given; although, if a master in his life-time manumits his slave, his *peculium* will pass to him of course, if not excepted; and thus the emperors *Severus* and *Antoninus* have decreed by their rescript. And the same emperors have also declared, that, when a *peculium* is bequeathed to a slave, it does not seem to be the intention of the testator, that such slave should have the power of demanding what he may have expended for the use of his master. And the same princes have farther declared, that a slave seems to be intitled to his *peculium*, if his liberty is left him, on condition, that he will bring in his accounts, and supply any deficiency out of the profits of his *peculium*.

Of corporeal and incorporeal Things.

XXI. Things incorporeal may be bequeathed as well as things corporeal: and therefore a debt, due to the testator, may be left as a legacy, and the heir be obliged to transfer his right of action to the legatary; unless the testator in his life-time received the money due to him; for in this case the legacy would become extinct. A legacy is also good, if conceived in the terms following:——"I command my heir to rebuild the house of TITIUS:" or, "to free him from his debts."

Of a particular Legacy.

XXII. If a testator bequeaths a slave, or any particular thing generally, the power of election is in the legatary, unless the testator hath declared otherwise.

Of the Legacy of an Option.

XXIII. The legacy of an option is made, when a testator commands his legatary to chuse any slave whom he likes, from among his slaves, or any one thing, which he best approves of, from any certain class of things; and such a legacy was formerly presumed to imply this condition, that, if the legatee in his life-time did not make his election, the legacy could not be transmitted to his heir. But, by virtue of our constitution, this presumed condition is now taken away, and the heir of the legatary is permitted to make his option, although the legatary in his life-time hath neglected to do it. And, upon a more diligent inspection, we have farther added to our constitution, that, if there are several legataries, to whom an option is left, and they differ in their choice, or if there are many heirs of one legatary, who are of divers sentiments, then *Fortune* must be the judge: for, lest the loss of the legacy should insue (which loss the generality of the antient lawyers, contrary to all benevolence, would have per-

mitted), we have decreed, that such dissentions between heirs, or legataries, should be decided by lot; so that the option of him, to whom the lot falls, shall be preferred.

To whom Legacies may be left.

XXIV. A legacy cannot be left but to those, who have the capacity of taking by testament.

Antient Law respecting uncertain Persons.

XXV. It was not formerly permitted, that either legacies, or gifts in trust, should be bequeathed to uncertain persons; for even a soldier was prohibited to bequeath to uncertain persons; as the emperor *Adrian* hath declared by his rescript: and an uncertain person is reputed to be one, whom the testator hath figured only in his imagination, without any determinate knowledge of him: as if a testator should thus express himself:——"Whoever shall give his daughter in marriage to my son, to that person let my heir deliver up such a piece of ground." And, if a testator had made a bequest *to the first consuls designed after his testament was written*, this also would have been esteemed a bequest to uncertain persons: and of the same kind there are diverse other examples. Freedom likewise could not be conferred upon an uncertain person; for it was necessary, that all slaves should be nominally infranchised: but a legacy might have been given to an uncertain person under a certain demonstration; or, in other words, to an uncertain person, if he was one of a number of persons certain; as for instance, if a testator should bequeath in the manner following;——"I command TITIUS my heir to give such a particular thing to any one of my present collateral relations, who shall think proper to take my daughter in marriage." But, if a legacy or fiduciary gift had been paid to uncertain persons by mistake, it was provided by the constitutions, that such persons were not compellable to refund.

Antient Law respecting a posthumous Stranger.

XXVI. Formerly a legacy could not have been profitably or legally given to a posthumous stranger; and a posthumous stranger is he, who, if he had been born before the death of the testator, could not have been numbered among his proper heirs: and of consequence a posthumous grandson, by an emancipated son, was a posthumous stranger in regard to his grandfather.

New Law.

XXVII. Such was the state of the ancient law, which hath not been left without a proper emendation; for we have promulged a constitution, by which we have altered the law concerning un-

certain persons, not only in respect to inheritances, but in regard also to legacies and fiduciary bequests. But this alteration will evidently appear from a perusal of the constitution itself; which nevertheless gives no authority to the denomination of an uncertain tutor; for it is incumbent upon every parent to take care of his posterity in this respect, by a certain and determinate appointment.

Concerning a posthumous Stranger appointed Heir.

XXVIII. A posthumous stranger could formerly have been instituted, and may now be appointed, an heir, unless it appears, that he was conceived by a woman, who could not have been legally married to his father.

Of Error in the Name of the Legatee.

XXIX. Although a testator may happen to have mistaken the *nomen, cognomen, prænomen,* or *agnomen* of a legatary, yet, if his person is certain, the legacy is good. The same rule of law is also observed in regard to Heirs, and with great reason; for the use of names is but to point out persons; and, if persons can be denoted by any other method, it will make no difference.

Of false Demonstration.

XXX. The rule of law, which comes nearest to the foregoing, is, that a legacy is not rendered null by a false demonstration: suppose, for instance, that a bequest is thus worded:——"I give and bequeath STICHUS my slave, who was born in my family:" ——in this case, although *Stichus* was not born in the family of the testator, but bought, yet, if there is a certainty of his person, the legacy is valid. And if a testator should write as follows: ——"I bequeath STICHUS my slave, whom I bought of SEIUS" ——yet, although he was bought of another, the legacy would be good, if there was no doubt as to the identity of the person of STICHUS.

Of a false Reason assigned.

XXXI. *A fortiori* a legacy is not rendered the less valid, although a false reason is assigned for bequeathing it: as if a testator should thus express himself:——"I give my slave STICHUS to TITIUS, because he took care of my affairs in my absence;" or, "because I was acquitted upon an accusation of a capital offence by his care and protection." For although *Titius* had never taken care of the affairs of the deceased, and although the testator was never acquitted from any charge of a capital crime by means of *Titius*, the legacy will nevertheless be good. But if the bequest had been declared to be conditional, as for example, if the testator

had expressed himself as follows "——I give to *Titius*, such a piece of ground, if it shall appear, that he hath taken a proper care of my affairs," then the law would be different.

Of the Slave of the Heir.

XXXII. It hath been a question, whether a testator can legally give a legacy to the slave of his heir; and it is certain, that a legacy, purely and simply given to such a slave, can avail him nothing, although he should afterwards be freed from the power of the heir in the life-time of the testator; for a bequest, which would have been null, if the testator had expired immediately after he had made it, ought not to become valid, merely because the testator happened to enjoy a longer life. But a testator may give a conditional legacy to the slave of his instituted heir, and such legacy will be good, if the slave is not under the power of the heir, when the condition is fulfilled.

Of the Master of the Heir.

XXXIII. On the contrary it is not doubted, but that a slave may be appointed an heir, and that his then master may take even a simple legacy by the same testament; for, although the testator should die instantly after making his testament, yet the legacy is not understood to become immediately due from the slave, who is the heir: for the inheritance is here separate from the legacy, and another may become heir by means of the slave, if he should be transferred to a new master, before he hath entered upon the inheritance, at the command of his master, who is the legatary; or the slave himself may become heir in his own right by manumission; and, in these cases, the legacy would be good. But, if the slave should remain in the same state, and enter upon the inheritance by order of his master, who is the legatary, the legacy would, as such, become extinct.

Of the manner of giving Legacies. Of the order of the words.

XXXIV. A legacy could not formerly have been given with effect, till the heir was instituted; because a testament receives its whole force and efficacy from the institution of the heir, which is understood to be the basis and foundation of it: and by a parity of reasoning it was also necessary, that the institution of an heir should always precede the grant of freedom in a testament. But we have thought it to be wrong and absurd, that a strict regard should be paid to the mere order of writing, in direct opposition to the express intention of a testator; and the antients themselves seem to have been of this opinion in general: we have therefore, by virtue of our constitution, amended the law in this point; so that a legacy may now be given; and, *a fortiori*, a grant

of liberty, which is always favored, may be bequeathed, before the institution of an heir, where there is but one; and, either before or between the institutions of heirs, where there are several.

Of a Legacy after the death of the Heir.

XXXV. A bequest, made to take place after the death of an heir or legatary, was also ineffectual: for, if a testator had written, "when my heir is dead, I give and bequeath an hundred AUREI to Titius,—*or even thus*, I give and bequeath an hundred AUREI to be paid to Titius, on the day preceding the day of the death of my heir,——*or*, on the day preceding the day of the death of my legatary,——" the legacies in any of these cases would have been void. But we have corrected the antient rule of law in this respect, by giving all such legacies the same validity, which is given to gifts in trust; lest trusts should be found to be more favored, than legacies.

Conditional Penal Inheritances.

XXXVI. Also formerly, if a testator had given, revoked, or transferred a legacy *pœnæ nomine*, he would have acted ineffectually; and a legacy is reputed to be bequeathed *pœnæ nomine*, [*i. e.* as a punishment or penalty,] when an heir is put under the necessity of doing or not doing something: as for instance, if a testator had thus written; "if my heir gives his daughter in marriage to TITIUS; *or*, if he does not give her in marriage to Titius, let him pay ten Aurei to Seius: *or thus*——if my heir shall alien my slave Stichus; *or*, *on the contrary*, if my heir shall not alien my slave Stichus, let him pay ten Aurei to Titius." And this rule was so far observed, that it was expressly ordained by many constitutions, that even the emperor could not receive a legacy, which was bequeathed *pœnæ nomine*; nor could a penal legacy be valid, even when it had been bequeathed by the testament of a soldier; although, in every other respect, the intention of a testator in a military testament was always scrupulously adhered to. And even freedom could not be bequeathed, nor, in the opinion of Sabinus, could an heir be added in a testament, *sub pœnæ nomine*: for, if a testator had said, "let Titius be my heir, but if he gives his daughter in marriage to Seius, let Seius also be my heir," the appointment of *Seius* would have been void; for the manner, in which an heir was laid under coercion, whether it was by the gift of a legacy, or by the addition of another heir, worked no alteration in the general rule of law. But this scrupulosity hath been by no means agreeable to us, and we have therefore ordained, that in general the doctrine of the law in regard to any thing left, revoked, or transferred, in punishment of an heir, should not differ from the rules of law

observed in relation to other legacies, when the performance of the condition of obtaining them is neither impossible, prohibited by law, nor contrary to good manners: for the morality, religion, and justice of the present times, will not suffer such testamentary dispositions to take place.

TITLE XXI.

Of the Revocation or Transfer of Legacies.

Of the Revocation of Legacies.

A revocation of a legacy is valid, although it is inserted in the same testament or codicil, in which the legacy was given. And it is immaterial, whether the revocation is made in words contrary to the bequest; as when a testator gives a legacy in these terms, "I give and bequeath to Titius,"——and revokes it by adding, "——I do not give and bequeath to Titius:" or whether the revocation is made by any other form of words.

Of the Transfer.

I. A legacy may also be transferred from one person to another; as thus "——I give to Seius my slave Stichus, whom I have bequeathed to Titius." This may be done in the same testament or codicil, in which the legacy was first given; and thus a legacy may be taken tacitly and by implication from Titius and transferred to Seius.

TITLE XXII.

Of the Falcidian Law.

Reason and Sum of this Law.

IT remains to speak of the law *Falcidia*, by which legacies have received their latest regulation. By the law of the 12 tables,—— *uti quisque legassit suæ rei, ita jus esto,*——a testator was permitted to dispose of his whole patrimony in legacies: but it was thought proper to restrain this licence even for the benefit of testators themselves, because they frequently died intestate, their heirs refusing to enter upon an inheritance, from which they could receive no profit, or but very little. And this occasioned the introduction first of the law *Furia*, and afterwards of the law *Voconia:* but, when neither of these was found adequate to the purpose intended, the *Falcidian* law was at length enacted; which prohibits a testator to give more in legacies, than three fourths of all his effects; so that, whether there is one or more heirs, there must now remain to him, or them, an intire fourth part of the whole.

Of the Plurality of Heirs.

I. When two heirs are instituted, for example, *Titius* and *Seius*, and *Titius's* moity of the inheritance is wholly exhausted, or overcharged by legacies, which he his expressly ordered to pay; and on the other side *Seius's* moity is either not incumbered, or is charged with legacies, which amount only to a part of his share; it hath in this case been a question, whether, although *Seius* hath a fourth or more of the whole inheritance, it may not nevertheless be lawful for *Titius* to make a stoppage out of the legacies, with which he is charged, so as to retain a fourth part out of his own moity? and it hath been determined, that *Titius* may make such stoppage: for the reason and equity of the law *Falcidia* extends to each heir in particular.

Quantity of the Inheritance.

II. But the law *Falcidia* hath regard only to the quantity of the estate at the time of the death of the testator; and therefore, if he, who is worth but an hundred *aurei* at his decease, bequeaths them all in legacies, the legatees must suffer a defalcation; for they will receive no manner of advantage, although the inheritance, after the death of the testator and before it is entered upon, should so increase by the acquisitions of slaves, the children of female slaves, or the product of cattle, that after a full payment of the 100 *aurei* in legacies, an intire fourth of the whole estate might remain to the heir; for, notwithstanding the increase of the testator's estate, subsequent to his death, a fourth part of the hundred *aurei* would still be due to the heir, and the legacies would remain subject to a defalcation upon that account. But, on the contrary, if a testator hath bequeathed 75 *aurei* in legacies, and was worth an hundred *aurei* at his death, then although it should happen, that, before the entrance of the heir, the estate should so decrease by fire, shipwreck, or the loss of slaves, that the whole value of it should not be more than 75 *aurei*, and perhaps less, yet the legacies would still be due without defalcation; nor is this law prejudicial to an heir, who is always at his election either to refuse or accept an inheritance; but it obliges legataries to come to an agreement with the heir to take a part, lest they should lose the whole of their legacies by his desertion of the testament.

Deductions before the effect of the Falcidian law.

III. The *Falcidian* portion is not taken by the heir, till the debts, funeral expences, and the price of the manumission of slaves, have all been previously deducted; and then the fourth part of the remainder appertains to the heir, and the other three parts are divided among the legataries in a ratable proportion: for

example, let it be supposed, that 400 *aurei* have been bequeathed in legacies, and that the estate, from which these legacies are intended to issue, is worth but exactly that sum; it follows, that a fourth must be substracted from the legacy of each legatary; but, if the testator gave in legacies no more than 350 *aurei*, and there remained after debts paid 400, then an eighth only ought to be deducted from each legacy. And, if a testator hath bequeathed 500 *aurei* in legacies, and there remain clear in the hands of the heir but 400, then a fifth must first be deducted from every legacy, and afterwards a fourth: but that, which exceeds the real value of the goods of the deceased, must first be substracted, and then follows the deduction of what is due to the heir.

TITLE XXIII.

Of Fiduciary Inheritances.

Continuation.

LET us now proceed to trusts; in treating of which, we will first speak of fiduciary inheritances.

Origin of Fiduciary Trusts.

I. It must be observed, that in the first times all trusts were weak and precarious; for no man could be compelled to the performance of what he was only *requested* to perform. And yet, when testators were desirous of giving an inheritance or legacy to persons, to whom they could directly bequeath neither, they then committed the inheritance or legacy in trust to those, who were capable of taking; and such commitments were called fiduciary, because the performance of the trust could not be inforced by the law, but depended solely upon the honour of the trustee. But the emperor *Augustus*, having been frequently moved with compassion on account of particular persons, and detesting the perjury and perfidiousness of trustees in general, commanded the consuls to interpose their authority; and this, being a just and popular command, gave them by degrees a continued jurisdiction; and in process of time trusts became so common, and were so highly favoured, that a prætor was purposely appointed to give judgment in these cases, and was therefore called the commissary of trusts.

Of the Fiduciary Trusts of the Heir.

II. We must here observe, that there is an absolute necessity of appointing an heir in direct terms to every testament; but he then may be requested to restore the inheritance to any other person; yet without an heir a testament is ineffectual. And therefore, when a testator says——*let* Lucius Titius *be my heir*——he may

add——*and I request you,* LUCIUS TITIUS, *that, as soon as you enter upon my inheritance, you would restore it to* CAIUS SEIUS. But a testator is at liberty to request his heir to restore a part of the inheritance only, and may make him a trustee upon condition, or from a day certain.

Effect of the Restitution of the Inheritance.

III. After an heir hath restored an inheritance in obedience to the trust reposed in him, he nevertheless continues heir. But he, who hath received the inheritance from such fiduciary heir, is sometimes reputed to be in the place of the heir, and sometimes in the place of a legatary.

Of the Trebellian Senatus-Consultum.

IV. In the reign of NERO the emperor, when TREBELLIUS MAXIMUS and ANNÆUS SENECA were consuls, it was provided by a decree of the senate, that, if an inheritance was restored by reason of a trust, all actions, which by the civil law might be brought by or against the heir, should be given to and against him, to whom the inheritance was restored.—And, after this decree, the prætor began to give equitable and beneficial actions to and against the receiver of an inheritance, as if he was the heir.

Of the Pegasian Senatus-Consultum.

V. But, when written heirs were requested to restore the whole, or almost the whole, of an inheritance, they often refused to accept it, since they could receive but little or no emolument; and thus it happened, that trusts were frequently extinguished. But afterwards in the consulate of *Pegasus* and *Pugio*, in the reign of the emperor *Vespasian* the senate ordained by their decree, that an heir, who was requested to restore an inheritance, might retain a fourth, as in the case of legacies by the *Falcidian* law. And an heir is also allowed to make the same deduction from particular things, which are left to him in trust for the benefit of another. For, some time after this decree, the heir alone bore the burden of the inheritance, (*i. e.* all the charges and demands incident to it;) but afterwards, whoever had received a share or part of an inheritance, by being benefited under a trust, was regarded as having a partial legacy; and this species of legacy was called *partition*, because the legatary took a part of the inheritance together with the heir; and thence it arose, that the same stipulations, which were formerly used between the heir and legatary in part, were also interposed between the person benefited under the trust, and the heir or trustee, to the intent, that the profit and loss might be in common between them in due proportion.

Where it is Applied.

VI. And therefore, if a written heir, or heir in trust, had not been requested to surrender more than three fourths of the inheritance, he was obliged to restore so much of it, by virtue of the *Trebellian senatus-consultum*; and all actions, whether in favour of, or against, the inheritance, were brought, or sustained, by the heir and *fidei-commissary*, according to their respective shares; and this obtains, in regard to the heir, by virtue of the civil law: and, in regard to the *fidei-commissary*, by virtue of the *Trebellian* decree. But, if the written heir was requested by the testator to restore the whole inheritance, or more than three fourths, then the *Pegasian senatus-consultum* took place; for, if he had once taken upon himself the heirship voluntarily, he was obliged to sustain all charges; and this, whether he did, or did not, retain the fourth, to which he was intitled. But, when an heir retained a fourth part, the stipulations, called *partis et pro parte*, were entered into, as between a legatary in part and an heir; and, when the heir did not retain a fourth, then the stipulations, called *emptæ et venditæ hæreditatis*, were interposed. But, if the written heir, or heir in trust, refused to accept the inheritance on suspicion, that there would not be assets, and that the acceptance would be detrimental to him, it was provided by the *Pegasian* decree, that the prætor, at the instance of the *fidei-commissary*, might compel such heir to take upon himself the inheritance, and then restore it; and that afterwards all actions should be brought by or against the *fidei-commissary* only; as it is ordained by the *Trebellian* decree. And in this case stipulations are not necessary; for the heir, who restores the inheritance, is made effectually secure, and all hereditary actions are transferred to and against him, by whom the inheritance is received; there being, in this instance, a concurrence of both decrees, the *Pegasian* and the *Trebellian*.

Trebellian Decree.

VII. But, as the stipulations, which took their rise from the *Pegasian* decree, were displeasing even to the antients themselves, insomuch that *Papinian*, a man of a true sublime genius, does not scruple to call them captious in some cases, and, as simplicity is far more agreeable to us in all matters of law, than unnecessary difficulties, it hath therefore pleased us, upon comparing the agreement and disagreement of each decree, to abrogate the *Pegasian*, which was subsequent to the *Trebellian*, and to transfer a greater authority to the *Trebellian* decree, by which all *fidei-commissary* inheritances shall be restored for the future, whether the testator hath given by his will a fourth part of his estate to his written heir,

or more or less than a fourth, or even nothing; so that, when either nothing is given to the heir, or less than a fourth part, he may be permitted to retain a fourth, or as much as will complete the deficiency, by virtue of our authority, or even to demand a repayment of what he hath paid in his own wrong, all actions being divided between the heir and the *fidei-commissary* in a just proportion according to the *Trebellian* decree. But, if the heir spontaneously restores the whole inheritance, all actions must be brought either by or against the *fidei-commissary*. And, whereas it was the principal effect of the power of the *Pegasian* decree, that, when a written heir had refused to accept an inheritance, he might be constrained to take it, and restore it, at the instance of the *fidei-commissary*, to whom, and against whom, all actions passed, we have transferred that power to the *Trebellian* decree; so that this is now the only law, by which a fiduciary heir can be compelled to enter upon the inheritance, when the *fidei-commissary* is desirous, that it should be restored; and the heir, in this case, can neither receive profit, nor suffer loss.

The application of what is above said.

VIII. But it makes no difference, whether an heir, who is instituted to the whole of an inheritance, is requested by the testator to restore the whole or a part of it only—or whether an heir, who is nominated but to a part of an inheritance, is requested to restore that intire part, or only a portion of it; for we have ordained, that the same rule of law shall be observed, whether an heir is requested to restore the whole or a part only of an inheritance.

Farther Effects of this Decree.

IX. If an heir is requested by a testator to give up an inheritance, after deducting some specific thing, amounting to a fourth, as a piece of ground, &c. he may be compelled to give it up by the *Trebellian* decree, in the same manner, as if he had been requested to restore the remainder of an inheritance, after reserving to himself a fourth. There is however this difference, that, in the one case, when an heir is requested to give up an inheritance, after deducting a particular thing, then all actions, passive as well as active, are transferred by virtue of the decree to the *fidei-commissary*, and what remains with the heir is free of all incumbrance, as if acquired by legacy; and, in the other case, when an heir is requested in general terms to give up an inheritance, after retaining a fourth to himself, all actions are proportionably divided; those, which regard the three fourths of the estate, being transferred to the *fidei-commissary*; and those, which regard to the single fourth, remaining for the benefit of the heir. And, even

if an heir is requested to give up an inheritance, after making a deduction of some particular thing, which amounts to the value of the greatest part of it, all actions, both active and passive, are nevertheless transferred to the *fidei-commissary*, who ought therefore always well to consider, whether it will be expedient or not, that the inheritance should be given up to him. And the law is the same, whether an heir is requested to give up an inheritance after a deduction of two, or more, specific things—or of a certain sum of money, which exceeds in value the greatest part of the inheritance. Thus what we have said of an heir, who is instituted to the whole of an inheritance, is equally true of him, who is instituted only to a part.

Of Fiduciary Bequests.

X. And farther, even a man, who is willing to die intestate, may request the person, which he thinks will succeed him, either by the civil or prætorian law, to give up the whole inheritance, or a part of it, or any particular thing, as a piece of ground, a slave, a sum of money, &c. But this liberty is granted to intestates in regard to trusts only; for legacies are not valid, unless they are bequeathed by testament.

Of Fidei-Commissaries.

XI. A *fidei-commissary* may also himself be requested to pay over, or give up, to another, either the whole, or a part, of what he receives; or even to give some other thing in lieu of it.

Of the Proof of Fiduciary Trusts.

XII. All fiduciary gifts or bequests depended formerly in a precarious manner upon the sole *faith* of the heir; from which they took as well their name as their essence; and the emperor *Augustus* was the first, who thought it proper to reduce them under a judicial cognizance. But we have since endeavoured to exceed that prince; and at the instance of that most excellent man *Tribonian*, the quæstor of our palace, we have enacted by our constitution, that, if a testator hath trusted to the faith of his heir for the surrender of an inheritance, or any particular thing, and this trust can not be made manifest by the depositions of five witnesses, (which is known to be the legal number in such cases,) there having been not so many, or perhaps no witnesses present, the heir at the same time perfidiously refusing to make any payment, and denying the whole transaction, then in this case the *fidei-commissary*, having previously taken the oath of calumny, may put the heir, although he is even the son of the testator, to his oath, and thus force him either to deny the trust upon oath, or comply with it, whether the trust is universal or particular; and

this is allowed, lest the last will of a testator, committed to the faith of an heir, should be defeated. And we have thought it right, that the same remedy should be taken against a legatary, or even a *fidei-commissary*, to whom a testator hath left any thing with a request to give it up. And, if any man, to whom something hath been left in trust to be given to another, should confess the trust, after he hath denied it, but endeavour at the same time to shelter himself under the subtility of the law, he may nevertheless be compelled to perform his duty.

TITLE XXIV.

Of what may be left in fiduciary Trust.

Summary.

A MAN may also leave particular things in trust; as a field, silver, cloaths, or a certain sum of money;——and may request either his heir to restore them, or even a legatary: although a legatary can not be made chargeable with a legacy.

Subjects of such Trust.

I. A testator may leave not only his own property in trust, but also the property of his heir, of a legatary, of a *fidei-commissary*, or of any other: so that a legatary or *fidei-commissary* may not only be requested to give what hath been left to him, but what is his own, or even what is the property of another. And the only caution necessary to be observed by the testator is, that no man be requested to give more, than he hath received by means of the testament; for the excess will be ineffectually bequeathed. And, when the property of another is left in trust, the person, requested to restore it, is obliged either to obtain from the proprietor the very thing bequeathed, or to pay the value of it.

Of the Liberty of Slaves.

II. Liberty may also be conferred upon a slave by virtue of a trust: for an heir, a legatary, or a *fidei-commissary*, may be requested to manumit: nor does it make any difference, whether the testator requests the manumission of his own slave, of the slave of his heir, of the slave of a legatary, or of the slave of a stranger: and therefore, when a slave is not a testator's own property, he must be bought, if possible, and manumitted. But, if the proprietor of the slave refuses to sell him, (which refusal the proprietor may justify, if he hath taken nothing under the will of the testator,) yet the fiduciary bequest is not extinguished, but deferred only, till it can be conveniently performed. It is here to be observed, that he, who is manumitted in consequence of a

trust, does not become the freedman of the testator, although he was the testator's own slave, but he becomes the freedman of the manumittor: but a slave, to whom liberty is directly given by testament, becomes the freedman of the testator, and is called *Orcinus*; and no one can obtain liberty directly by testament, unless he was the slave of the testator, not only at the time of the testator's death, but also at the time of the making of his testament. And liberty is understood to be directly given, not when a testator requests that his slave shall be made free by another, but when he commands that the freedom of his slave shall commence instantly by virtue of his testament.

Of the verbal Form of Trusts.

III. The terms generally used in the commitment of trusts are the following:—*peto, rogo, volo, mando, fidei tuæ committo:*—any of which words, singly taken, is as firm and binding, as if all were joined together.

TITLE XXV.

Of Codicils.

Origin of Codicils.

IT is certain, that codicils were not in frequent use before the reign of *Augustus:* for *Lucius Lentulus,* by whose means trusts became efficacious, was the first, who caused authority to be given to codicils. When he was dying in *Africa,* he wrote several codicils, which were confirmed by his testament; and in these he requested *Augustus* to perform some particular act in consequence of a trust: the Emperor complied with the request; and many other persons afterwards, being influenced by the authority of the Emperor's example, punctually performed trusts, which had been committed to their charge: and the daughter of *Lentulus* paid debts which, in strictness of law, were not due. But it is reported, that *Augustus,* having convened upon this occasion the sages of the law, and also *Trebatius,* whose opinion was of the greatest authority, demanded, whether codicils could be admitted to be of force, and whether they were not repugnant to the very reason of the law? to which *Trebatius* answered, that codicils were not only most convenient, but most necessary, on account of the great and long voyages, which the *Romans* were frequently obliged to take, to the intent, that where a man could not make a testament, he might bequeath his effects by codicil. And afterwards, when *Labeo,* a lawyer of great eminence, disposed of his own property by codicil, it was no longer a doubt, but that codicils might be legally allowed.

Antecedent Codicils.

I. Not only he, who hath already made his testament, is permitted to make a codicil, but even an intestate may commit a trust to others by codicil: yet, when a codicil is antecedent to a testament, the codicil, according to *Papinian*, cannot otherwise take effect, than by being confirmed by the subsequent testament. But the emperors SEVERUS and ANTONINUS have by rescript declared, that a thing, left in trust in a codicil preceding a testament, may be demanded by a *fidei-commissary*, if it appears that the testator hath not receded from the intention, which he at first expressed in his codicil.

An Inheritance not given by Codicil.

II. But an inheritance can neither be given nor taken away by codicil, lest the different operations of testaments and codicils should be confounded: and of course an heir cannot be disinherited by codicil.——But although an inheritance can neither be given nor taken away by codicil, in *direct* terms, yet it may be legally left from the heir in a codicil, by means of a trust or *fidei-commissum*. But no man is allowed to impose a condition upon his heir by a codicil, nor to substitute *directly*.

Of the Plurality of Codicils.

III. A man may make many codicils, and they require no solemnity.

THE

INSTITUTIONS

OR

ELEMENTS OF JUSTINIAN.

Book the Third.

TITLE I.

OF INHERITANCES WHICH ARE LEFT BY AN INTESTATE.

EVERY person is said to die intestate, who hath either not made a testament; or, if he has made one, hath neglected to use the solemnities prescribed by law. A man is also said to die intestate, if his testament, although rightly made, is either cancelled or rendered void; or if no one will take upon himself the heirship by virtue of the testament.

First Order.

I. The inheritances of intestates, according to the law of the twelve tables, belong primarily to the *sui hæredes, i. e.* to the proper or domestic heirs of such intestates.

Who are proper Heirs.

II. And, as we have observed before, those are esteemed *sui hæredes*, or proper heirs, who, at the time of the death of the deceased, were under his power; as a son or a daughter, a grandson or a grand-daughter by a son, a great-grandson or great-grand-daughter by a grandson of a son, *&c.*——neither is it material, whether these children are natural or adopted. But, in the number of natural children, we must reckon these, who, although they were not born in lawful wedlock, are, nevertheless, according to the tenor of the imperial constitutions, intitled to the rights of proper heirs, by being admitted into the order of Decurions. We must also add those persons, who are comprised within our own constitutions, by which it is ordained, that, if any person, without intending matrimony, shall keep a woman, with whom he is not prohibited to marry, and have children by her, and shall afterwards, through the dictates of affection, marry that woman, and have other children by her, sons or daughters, then not only

these latter children, born after the celebration of marriage, shall be legitimate, and in the power of their father, but also the former, who gave occasion to the legitimacy of those who were born afterwards. And we have thought it expedient, that this law shall also obtain in regard to the children born before marriage, although the children born subsequent to it are dead; or even although there never were any children subsequent to the marriage. But a grandson or grand-daughter, a great-grandson or great-grand-daughter, is not reckoned in the number of proper heirs, unless the person preceding them in degree hath ceased to be under paternal power, either by death or some other means, as by emancipation: for, if a son, when his father died, was under the power of his father, the grandson can by no means be the proper or domestic heir of his grand-father; and, by a parity of reasoning, this rule is understood to take place in relation to all descendants in the right line. But all posthumous children, who would have been under the power of their father, if they had been born in his life-time, are esteemed *sui hæredes*, or proper heirs.

Incompetence.

III. Persons may become *sui hæredes*, or proper heirs, without their knowledge, and even although they are disordered in their senses: for, as inheritances may be acquired without our knowledge, it is a consequence, that they may also be acquired by persons deprived of their understanding. And here observe, that the dominion of an inheritance is continued in the heir from the very instant of the death of his ancestor, and that the authority of a tutor is not necessary to enable a pupil to inherit, because inheritances may be acquired by proper heirs, without their knowledge: neither does a disordered person inherit by the assent of his curator, but by operation of law.

Of Posthumous Heirs.

IV. But sometimes a child becomes a proper heir, although he was not under power, at the time of the death of his parent; as when a person returns from captivity after the death of his father: and this is effected by the *jus postliminii*, or right of return.

Of Infamous Persons.

V. On the contrary, it may happen, that a child, who, at the time of the death of his parent, was under his power, shall not be his proper heir: as when a parent, after his decease, is adjudged to have been guilty of lese-majesty, by which crime his memory is rendered infamous; for a criminal of this sort can have no proper heir, inasmuch as all his possessions are forfeited

to the treasury. But a son, in this case, may strictly be said to *have been* the proper heir of his father, and afterwards to have ceased to be so.

Of the Division of an Inheritance.

VI. When there is a son or a daughter, and a grandson or grand-daughter by another son, they are called equally to the inheritance of their parents; nor does the nearest exclude the more remote; for it appears just, that grandsons and grand-daughters should succeed in the place of their father. And, by the same reasoning, if there is a grandson or grand-daughter by a son, and a great-grandson or great-grand-daughter by a grandson, they ought all to be called to the inheritance. And, inasmuch as it hath been esteemed right, that grandsons and grand-daughters, great-grandsons and great-grand-daughters, should succeed in the place of their parent, it seemed convenient, that inheritances should not be divided into *capita*, but into *stirpes*: so that, where there is a son and grand-children by another son, the son possesses half the inheritance, and the grand-children, however numerous, are entitled only to the other half, as the representatives of their father. And in like manner, where there are grand-children by two sons, the one son leaving one or two children, and the other three or four, the inheritance must be equally divided, half belonging to the single grand-child, or the two grand-children by the one son, and half to the three or four grand-children by the other son.

When Heirs become so.

VII. Whenever it is demanded, whether any person is a proper heir, we must enquire at what time it was certain, that the deceased died without a testament; and a man is said to die without a testament, if his testament is relinquished. Thus if a son is disinherited and a stranger is instituted heir, and, after the death of the son, it becomes certain, that the instituted heir was not in fact the heir, either because he was unwilling, or unable, to accept the inheritance, in this case, the grandson of the deceased becomes the proper heir of his grandfather: for at that time, when it was certain, that the deceased died intestate, there was no other heir, but the grandchild; and this is evident

Of Posthumous Grandchildren.

VIII. And although a child is born after the death of his grandfather, yet, if he was conceived in the life-time of his grandfather, he will, at the death of his father and after his grandfather's testament is deserted by the instituted heir, become the proper heir of his grandfather. But, if a child is both conceived

and born after the death of his grandfather, such child, although his father should die and the testament of his grandfather be deserted, could not become the proper heir of his grandfather; because he was never allied to his grandfather by any tye of cognation: neither is he, whom an emancipated son hath adopted, to be reckoned in any respect among the children of his adoptive father's father. So that the adopted children of an emancipated son can neither become the proper heirs of their father's father in regard to the inheritance, nor demand the possession of goods, as next of kin. This is what we have thought it expedient to observe concerning proper heirs.

Of Emancipated Children.

IX. Emancipated children by the civil law have no right to the inheritances of their parents; for those are not proper heirs, who have ceased to be under the power of their parent deceased, before his death, neither are they called to inherit by any other right according to the law of the twelve tables. But the prætor, induced by natural equity, grants them the possession of goods, by the edict beginning, *unde liberi*, as fully, as if they had been under power at the time of the death of their parent; and the prætor grants this, whether they are sole, or mixed with others, who are *proper heirs:* therefore, when there are two sons, the one emancipated, and the other under power at the time of his father's death, the latter, by the civil law, is alone the heir, and alone the proper heir: but, when the emancipated son, by the indulgence of the prætor, is admitted to his share, then the proper heir becomes the heir only of his own moity.

If an Emancipated Child shall become an Adopted one.

X. But those, who after emancipation have given themselves in adoption, are not admitted, as children, to the possession of the effects of their natural father, if, at the time of his death, they were in the adoptive family. But, if in the life-time of their natural father they were emancipated by their adoptive father, they are then admitted by the prætor to take the goods of their natural father, as if they had been emancipated by him, and had never entered into the family of the adopter: and consequently, in regard to their adoptive father, they are looked upon as mere strangers. But those, who are emancipated by their adoptive father, after the death of their natural father, are nevertheless reputed strangers to their adoptive father: and, in regard to the inheritance of their natural father, they are not at all the more intitled to reassume the rank of children. These rules of law have been established, inasmuch as it was unjust, that it should

be in the power of an adopter to determine at his pleasure, to whom the inheritance of a natural father should appertain, whether to his children, or to his *agnates*.

Comparison of Natural and Adopted Children.

XI. Adopted children have therefore fewer rights and privileges, than natural children: for natural children, even after emancipation, retain the rank of children by the indulgence of the prætor, although they lose it by the civil law: but adopted children, when emancipated, lose the rank of children by the civil law, and are denied admittance into the rank of children by the prætor; and not without reason: for civil policy can by no means destroy natural rights; nor can natural children ever cease to be sons and daughters, grandsons and grand-daughters, although they may cease to be proper heirs; but adopted children, when emancipated, commence instantly strangers; for the right and name of son or daughter, which were obtained by the civil right of adoption, may be destroyed by another civil right; namely, by emancipation.

Of the possession of Goods contrary to the Tables.

XII. The same rules are observed in regard to that possession of goods, which the prætor, contrary to the testament of the parent, grants to the children, who are not mentioned in the testament, that is, to such, who are neither instituted heirs, nor properly disinherited. For the prætor calls those, who were under power at the time of the death of their parents, and those also, who are emancipated, to the same possession of goods; but he repels those, who were in an adoptive family at the time of the decease of their natural parents. And as the prætor admits not those adopted children, who have been emancipated by their adoptive father, to succeed him *ab intestato*, much less therefore does the prætor admit such children to possess the goods of their adoptive father contrary to his testament; for, by virtue of the emancipation, they cease to be in the number of his children.

Whence are Cognates.

XIII. We must nevertheless observe, that, although those, who were in an adoptive family, but have been emancipated by their adoptive father, after the decease of their natural father, dying intestate, are not admitted by that part of the edict, by which children are called to the possession of goods, yet they are admitted by another part, by which the *cognates* of the deceased are called to the possession of his effects. But, by this last-named part of the edict, the *cognates* are only called, when there is no opposition from *proper heirs*, emancipated children, or *agnates*:

for the prætor first calls the *proper heirs* with the emancipated children, then the *agnates*, and lastly the nearest *cognates*.

Emendation of the Antient Law.

XIV. These were the rules of law, which formerly obtained; but they have received some emendation from the constitution, which we promulged, relating to those persons, who are given in adoption by their natural parents: for we have found frequent instances of sons, who by adoption have lost their succession to their natural parents, and who, by the ease with which adoption is dissolved by emancipation, have also lost the right of succeeding to their adoptive parents. We therefore, correcting as usual whatever is amiss, have enacted a constitution, by which it is decreed, that, when a natural father hath given his son in adoption, all the rights of such son shall nevertheless be preserved intire, in the same manner, as if he had still remained under the power of his natural father, and there had been no adoption; except only, that the person adopted may succeed to his adopter, if he dies intestate. And it is also enacted, that, if the adopter makes a testament and omits the name of his adopted son, such son can neither by the civil nor the prætorian law obtain any part of the inheritance, whether he demands the possession of the effects *contra tabulas testamenti*, (contrary to the letter of the testament,) or prefers a complaint, alleging, that the testament is inofficious: for an adopter is under no obligation either to institute, or disinherit, his adopted son, inasmuch as there subsists not between them any natural tye or relation. And we have farther decreed, that no adopted person shall receive any benefit from the *Sabinian senatus-consultum*, by being one of three sons: for in this case he shall neither obtain the fourth part of his adoptive father's effects, nor be intitled to any action upon that account. But all those, who are adopted by their natural parents, *i. e.* by a grand-father or great-grand-father, &c. are excepted in our constitution: for, inasmuch as such persons are united together by the concurrence both of natural and civil rights, we have thought proper to retain the old law in relation to those adoptions; in the same manner, as when the father of a family hath given himself in arrogation. But all, which we have here observed, may be collected from the tenor of the above-mentioned constitution.

Of Descendants from Females.

XV. The antient law, shewing most favour to descendants from males, called those grand-children only, who were so descended, to the succession as proper heirs, and preferred them by the right of agnation: for the old law, reputing the grand-children born of

daughters, and the great-grand-children born of grand-daughters, to be *cognates*, prohibited such children from succeeding to their grand-father and great-grand-father, maternal or paternal, till after the line of *agnati* was exhausted. But the emperors *Valentinian*, *Theodosius*, and *Arcadius*, would not suffer such a violence against nature to continue in practice; and, inasmuch as the name of grand-child and great-grand-child is undoubtedly common, as well to descendants by females, as to descendants by males, they therefore granted an equal right of succession to descendants from males and descendants from females. But, to the end that those persons, who have been favoured by nature, as well as by the suffrage of antiquity, might enjoy some peculiar privileges, the same emperors have thought it right, that the portions of grand-children, great-grand-children, and other lineal descendants of a female, should be somewhat diminished, and therefore they have not permitted such persons to receive so much by a third part, as their mother or grand-mother would have received; or their father or grand-father, paternal or maternal, at the decease of a female; for we now treat concerning inheritances, derived from a female: and, although there were only grand-children by a female to take an inheritance, yet the emperors did not call the *agnates* to the succession. And as, upon the decease of a son, the law of the twelve tables calls the grand-children, and great-grand-children, male and female, to represent their father in respect to the succession of their grand-father, so the imperial ordinance calls them to succession in the place of their mother or grand-mother, with the before-regulated diminution of a third part of their share. But, as there still remained matter of dispute between the *agnati* and the above-named grand-children, the *agnati* claiming the fourth part of the estate of the deceased by virtue of a certain constitution, we have therefore not permitted it to be inserted into *our* Code from that of *Theodosius*. And we have farther taken care to alter the old law by our ordinance, having enacted, that *agnates* shall not be intitled to any part of the goods of the deceased, whilst grand-children born of a daughter, or great-grand-children born of a grand-daughter, or any other descendants from a female in the right line, are living; lest those, who proceed from the transverse line, should be preferred to lineal descendants. And we now decree, that this our ordinance shall obtain according to its full tenor. But as the old law ordered, that every inheritance should be divided into *stirpes*, and not into *capita*, between the son of the deceased and his grandsons by a son, so we also ordain,

that distribution shall be made in the same manner between sons and grandsons by a daughter, and between all grandsons and grand-daughters, great grandsons and great-grand-daughters, and all other descendants in a right line; so that the issue either of a mother or a father, or of a grand-mother or a grand-father, may obtain their portions without any diminution; and, if on the one part there should be only one or two claimants, and on the other part three or four, that the greater number shall be intitled only to one half, and the less number to the other half of the inheritance.

TITLE II.

Of the legitimate Succession of Agnates.

The second Order of legitimate Heirs.

WHEN it happens, that there are no proper heirs to succeed the deceased, nor any of those persons whom the prætor or the constitutions would call to inherit with proper heirs, then the inheritance, by a law of the twelve tables, appertains to the nearest *agnate.*

Of natural Agnates.

I. *Agnates*, as we have observed in the first book, are those, who are related or cognated by males, *(quasi a patre cognati:)* and therefore brothers, who are the sons of the same father, are *agnates* in regard to each other; they are also called *consanguinei*, being of the same blood; but it is not required that they should have the same mother. An uncle is also agnated to his brother's son, and *vice versa* the brother's son to his paternal uncle: and *brothers patruel*, that is, the children of brothers, who are also called *consobrini*, are likewise reckoned *agnates.* In this manner we may enumerate many degrees of agnation; and even those who are born after the decease of their parents, obtain the rights of consanguinity: the law nevertheless does not grant the right of inheritance to all the *agnati*, but to those only, who are in the nearest degree, when it becomes certain that the deceased hath died intestate.

Of adopted.

II. The right of agnation arises also through adoption; thus, the natural and adopted sons of the same father are *agnates*; but such persons are without doubt improperly called *consanguinei.* Also if a brother, a paternal uncle, or any other, who is agnated to you in a more remote degree, should adopt any person into his family, then such adopted person is undoubtedly to be reckoned in the number of your *agnati.*

Of Male and Female.

III. Succession among males proceeds according to the right of agnation, although they are in the most distant degree. But it hath pleased the antient lawyers, that females should only inherit by consanguinity, if they are sisters; and not in a more remote degree; though males might be admitted in the most distant degree to inherit females: thus, in case of death, the inheritance of your brother's daughter, or of the daughter of your paternal uncle or aunt, would appertain to you; but your inheritance would not appertain to them. And this was so constituted, because it seemed expedient for the benefit of society, that inheritances should for the most part fall into the possession of males. But, inasmuch as it was extremely unjust, that females should be thus almost wholly excluded as strangers, the prætor admitted them to the possession of goods in that part of his edict, in which he gives the possession of goods on account of proximity: yet they are only admitted upon condition, that there is no *agnate*, or nearer *cognate*. But the law of the twelve tables did not introduce these dispositions; for that law, according to the plainness and simplicity, which are agreeable to all laws, called the *agnates* of either sex, or any degree, to succession, in the same manner as it admitted *proper* heirs. But the middle law, which was posterior to the law of the twelve tables, and prior to the imperial constitutions, subtilly introduced the before-mentioned distinction, and entirely repelled females from the succession of *agnates*, no other method of succession being known, till the prætors, correcting by degrees the asperity of the civil law, or supplying what was deficient, added in their edicts a new order of succession, being induced to it by a motive of humanity; and, by introducing the line of cognation on account of proximity, they thus assisted the females, and gave them the possession of goods, which is called *unde cognati*. But we, although we have adhered to the law of the twelve tables, and strictly maintained it in regard to females, must yet commend the humanity of the prætors, though they have not afforded a full remedy in the present case. But, since the same natural degree of relation, and the same title of agnation appertains as well to females as to males, what reason can be assigned that males should be permitted to succeed all their *agnati*, and that no means of succession should be open to any female *agnate*, except a sister? We therefore, reducing all things to an equality, and making our disposition conformable to the laws of the twelve tables, have by our constitution ordained, that all legitime persons, that is, descendants from males, whether

male or female, shall be equally called to the rights of succession *ab intestato* according to the prerogative of their degree, and be by no means excluded, although they possess not the rights of consanguinity in so near a degree as sisters.

Of the Sons of Sisters.

IV. We have farther thought it necessary to add a clause to our constitution, by which one degree is transferred from the line of cognation to the line of legitime succession, i. e. of *agnation*: so that not only the son and daughter of a brother (according to our former definition of *agnates*) shall be called to the succession of their paternal uncle, but the son or daughter of a sister, who is either by the same father or by the same mother, may also be admitted with *agnates* to the succession of their maternal uncle; but no one of the descendants of the son or daughter of a sister is by any means to be admitted. And, when a person dies, who at his decease was both a paternal and maternal uncle, that is, who had nephews or neices living both by a brother and by a sister, then such children succeed in the same manner, as if they were all descendants from males, when the deceased leaves no brother or sister, and they take the inheritance not *per stirpes*, or according to their respective stocks, but *per capita*, i. e. by poll: but, if there are brothers or sisters, and they accept the succession, all others of a more remote degree are excluded.

Of Relations and Strangers.

V. When there are many degrees of *agnates*, the law of the twelve tables calls those, who are in the nearest degree: if therefore, for example, there is a brother of the deceased, and a son of another brother, or a paternal uncle, the brother is preferred. But, although the law of the twelve tables calls the nearest *agnate* in the singular number, yet it is not to be doubted, but that, if there are many, in the same degree, they ought all to be admitted. And, although properly the nearest degree must be understood to denote the nearest degree of many, yet, if there is but one degree of *agnates*, the inheritance must undoubtedly appertain to those, who are in that degree.

Of what time Relationship is Regarded.

VI. When a man dies and leaves no testament, then that person is esteemed his proximate kinsman, who was the nearest of kin at the decease of the intestate. But, when the deceased hath actually made a testament, then that person is esteemed his nearest of kin, who was so at the time, when it became certain, that the testamentary heir had declined the inheritance; for, till then, a man, who

hath made a testament, can not be said to have died intestate: and thus an intestacy does not sometimes become evident, till after a long time; in which space, the proximate kinsman being dead, it often happens, that he becomes the nearest of kin, who was not so at the death of the testator.

Of the Successory Edict.

VII. But it hath obtained as law, that there should be no succession among *agnates*; so that, if the nearest *agnate* is called to an inheritance, and hath either refused the heirship, or been prevented by death from entering upon it, his own legitime heir would not be admitted to succeed him. But this the prætors have in some measure corrected, and have not left the *agnates* of a deceased person wholly without assistance, but have ordered, that they should be called to the inheritance as *cognates*, because they were debarred from the rights of agnation. But we, being earnestly desirous to render our law as perfect and complete as possible, have ordained by our constitution, which, induced by humanity, we published concerning the right of patronage, "that legitime succession should not be denied to *agnates* in the inheritances of *agnates*:" for it was sufficiently absurd, that a right, which by means of the prætor was open to *cognates*, should be shut up and denied to *agnates*: but it was more abundantly absurd, that, in tutelages, the second degree of *agnates* should succeed upon failure of the first; and that the same law, which obtained in that, which was onerous, should not also obtain in that, which was lucrative.

Of the Legitimate succession of Parents.

VIII. A parent, who hath emancipated a son or a daughter, a grandson or a grand-daughter, or any other of his lineal descendants under a fiduciary contract, is admitted to their legitime succession. But it is now effected by our constitution, that every emancipation shall for the future be always regarded, as if it had been under such a contract; although among the antients the parent was never called to the legitime succession of his children, unless he had actually emancipated them under a fiduciary contract.

TITLE III.

Of the Tertyllian Senatus-Consultum.

Of the Law of the Twelve Tables and the Prætorian Right.

SUCH was the rigour of the law of the twelve tables, that it preferred the issue by males, and excluded those, who were related

by the female line, so that the right of succession was not permitted to take place reciprocally between a mother and her son, or a mother and her daughter. But the prætors, on account of the proximity of cognation, admitted those, who were related by the female line to the succession, giving them the possession of goods, called *unde cognati.*

Of the Constitution of Claudius.

I. But these narrow limits of the law were afterwards enlarged by the emperor Claudius, who first gave the legitime inheritance of deceased children to their mothers, in assuasion of their grief for so great a loss.

Of the Tertyllian Senatus-Consultum. Of the Right of Children.

II. But afterwards by the *Tertyllian senatus-consultum*, made in the reign of Adrian, the emperor, the fullest care was taken, that the succession of children should pass to their mother, though not to their grand-mother: so that a mother, who is born of free parents, and has the right of three children, and also a *libertine* or freed-woman, who has the right of four children, may be admitted, although they are under the power of a parent, to the goods of their sons or daughters, dying intestate. But, when a mother is under power, it is required, that she should not enter upon the inheritance of her children, but at the command of him, to whom she is subject.

Who are preferred to the Mother.

III. But, when a deceased son leaves children, who are proper heirs, or in the place of proper heirs, either in the first or an inferior degree, they are preferred to the mother of such deceased son. And the son, or daughter, of a deceased daughter is also preferred by the constitutions to the mother of the deceased daughter; i. e. to their grand-mother. Also the father of a son, or daughter, is preferred to the mother; but a grand-father or great-grand-father is not preferred to the mother, when the inheritance is contended for by these only without the father. Also the consanguine brother either of a son or a daughter excluded the mother; but a consanguine sister was admitted equally with her mother. But, if there had been both a brother and a sister of the same blood with the deceased, the brother of the deceased excluded his mother, although she was honoured with the privilege of those, who have children: But the inheritance, in this case, was always divided in equal parts between brothers and sisters.

A New Constitution.

IV. But by a constitution, which we have inserted in the code, and honoured with our name, we have thought proper, that mothers should be favoured in regard to the law of nature, on account of their pains in child-bearing, their great danger, and death itself, which they often suffer; we therefore have esteemed it to be highly unjust, that the law should make that detrimental, which is in its nature merely fortuitous; for, if a married woman, who is free-born, does not bring forth three children, or if a freed-woman does not become the mother of four children, can such persons, for that reason only, be with justice deprived of the succession of their children? for how can a failure of this nature be imputed to them as a crime? We therefore, not regarding any fixed number of children, have given a full right to every mother, whether ingenuous or a freed-woman, of being called to the legitime succession of her child or children deceased, whether male or female.

The Preference of the Mother.

V. But, in examining the constitutions of former emperors, relating to the right of succession, we observed, that these constitutions were partly favourable to mothers and partly grievous; not always calling them to the entire inheritance of their children, but in some cases depriving them of a third, which was given to certain legitime persons; and in other cases, doing the contrary; i. e. allowing a mother a third only. It hath therefore seemed right to us, that mothers should receive the succession of their children without any diminution, and that they should be exclusively preferred before all legitime persons, except the brothers and sisters of the deceased, whether they are *consanguine*, or only *cognate:* But, as we have preferred the mother to all other legitime persons, we are willing to call all brothers and sisters, legitime or otherwise, to the inheritance together with the mother: yet in such manner, that, if only the sisters, *agnate* or *cognate*, and the mother of the deceased survive, the mother shall have one half of the effects, and the sisters the other. But, if a mother survives, and also a brother or brothers, or brothers and sisters, whether *legitime* or *cognate*, then the inheritance of the intestate son or daughter must be distributed *in capita*; i. e. must be divided into equal shares.

Of the Tutor.

VI. As we have taken a particular care of the interest of mothers, it behoves them in return to consult the welfare of their children. Be it known therefore, that, if a mother shall neglect,

during the space of a whole year, to demand a tutor for her children, or shall neglect to require a new tutor in the place of a former, who hath either been removed or excused, she will be deservedly repelled from the succession of such children, if they die within puberty.

Of the Tertyllian Senatus-Consultum.

VII. Although a son or a daughter is of spurious birth, yet the mother, by the *Tertyllian senatus-consultum*, may be admitted to succeed to the goods of either.

TITLE IV.

Of the Orfician Senatus-Consultum.

Origin and Sum of the Senatus-Consultum.

ON the contrary children are reciprocally admitted to the goods of their intestate mothers, by the Orfician *senatus-consultum*, which was enacted in the consulate of Orficius and Rufus, in the reign of the emperor Marcus Antoninus; and, by this decree, the legitime inheritance is given both to sons and daughters, although they are under power; and they are also preferred to the consanguine brothers, and to the *agnates*, of their deceased mother.

Of the Grandson and Grand-daughter.

I. But, since grandsons and grand-daughters were not called by the *senatus-consultum* to the legitime succession of their grandmother, the omission was afterwards supplied, by the imperial constitutions: so that grandsons and grand-daughters were called to inherit, as well as sons and daughters.

Of the effect of Diminution.

II. But it must be observed, that those successions, which proceed from the *Tertyllian* and *Orfician senatus-consulta*, are not extinguished by diminution. For it is an established rule, that new legitime inheritances are not destroyed by diminution; but that it affects only those inheritances, which proceed from the law of the twelve tables.

Of Spurious Children.

III. It is lastly to be noted, that even illegitimate children are admitted by the *Orfician senatus-consultum* to the inheritance of their mother.

Of the Right of Accretion.

IV. When there are many legitime heirs, and some renounce the inheritance, or are hindered from entering upon it by death,

or any other cause, then the shares or portions of such persons fall by the right of accretion to those, who have accepted the inheritance: and, although the acceptors happen to die even before the refusal or the failure of their coheirs, yet the portions of such coheirs, will appertain to the heirs of the acceptors of the inheritance.

TITLE V.

Of the Succession of Cognates.

Third Order of Heritors.

AFTER the proper heirs and those, whom the prætor and the constitution call to inherit with the proper heirs, and after the legitime heirs (among whom are the *agnati*, and those, whom the above mentioned *senatus-consulta* and our constitution have numbered with the *agnati*) the prætor calls the nearest *cognates*, observing the proximity of relation.

Of Agnates who have suffered Diminution.

I. By the law of the twelve tables, neither the *agnates*, who have suffered diminution, nor their issue, are esteemed legitime heirs; but they are called by the prætor in the third order of succession: we must nevertheless except a brother and sister, although they are emancipated, but not their children; for the constitution of Anastasius calls an emancipated brother or sister to the succession of a brother or sister, together with those, who have not been emancipated, and are therefore *integri juris*; but it does not call them to an equal share of the succession, as may easily be collected from the very words of the constitution. But this constitution prefers an emancipated brother or sister to other *agnates* of an inferior degree, although unemancipated; and consequently to all *cognates* in general.

Of those who are connected by Women.

II. Those also, who are collaterally related by the female line, are called by the prætor in the third order of succession, according to their proximity.

Of Children given in Adoption.

III. Children, who are in an adoptive family, are likewise called in the third order of succession to the inheritance of their natural parents.

Of Spurious Children.

IV. It is manifest, that base born children have no *agnates*; inasmuch as *agnation* proceeds from the father, *cognation* from the mother; and such children are looked upon as having no

father. And, for the same reason, consanguinity cannot be said to subsist between the bastard children of the same woman; because consanguinity is a species of *agnation*. They can therefore only be allied to each other as they are related to their mother, that is, by *cognation*; and it is for this reason, that all such children are called to the possession of goods by that part of the prætorian edict, by which *cognates* are called by the right of their proximity.

Of Agnates and Cognates.

V. In this place it will be necessary to observe, that any person may, by the right of *agnation* be admitted to inherit, although he is in the tenth degree; and this is allowed both by the law of the twelve tables, and the edict, by which the prætor promises, that he will give the possession of goods to the legitime heirs. But the prætor promises the possession of goods to *cognates*, only as far as the sixth degree of *cognation*, according to their right of proximity; and in the seventh degree, to those *cognates* only, who are the descendants of a cousin german.

TITLE VI.

Of the Degrees of Cognation.

Division of Cognation

IT is necessary in this place to shew how the degrees of *cognation* are to be computed: and first we must observe, that there is one species of *cognation*, which relates to ascendants, another to descendants, and a third to collaterals. The first and superior *cognation* is that relation, which a man bears to his parents—the second, or inferior, is that, which he bears to his children—and the third is that relation, which he bears to his brothers and sisters, and their issue; and also to his uncles and aunts, whether paternal or maternal. The superior and inferior *cognation* commence at the first degree; but the transverse or collateral *cognation* commences at the second.

Of the first, second, and third Degree.

I. A father, or a mother, is in the first degree in the right line ascending: and a son, or a daughter, is also in the first degree in the right line descending. A grand-father, or a grand-mother, is in the second degree in the right line ascending: and a grandson, or grand-daughter, is in the second degree in the right line descending: and a brother, or a sister, is also in the second degree in the collateral line. A great grand-father, or a great grand-mother, is in the third degree in the right line ascending; and a

great-grandson, or great-grand-daughter, is in the third degree in the right line descending: and the son or daughter of a brother or sister is also in the third degree in the collateral line; and by a parity of reasoning an uncle, or an aunt, whether paternal or maternal, is also in the third degree. A paternal uncle, called *patruus*, is a father's brother;—a maternal uncle, called *avunculus*, is a mother's brother;—a paternal aunt, called *amita*, is a father's sister;—and a maternal aunt, called *matertera*, is a mother's sister. And each of these persons is called in Greek θειος or θεια promiscuously.

Fourth Degree.

II. A great-great-grand-father, or a great-great-grand-mother, is in the fourth degree in the right line ascending; and a great-great-grandson, or a great-great-grand-daughter, is in the fourth degree in the right line descending. Also, in the transverse or collateral line, the grandson, or the grand-daughter, of a brother or a sister, is in the fourth degree; and consequently a great uncle, or great aunt, paternal or maternal, is in the fourth degree: and also cousins german, who are called *consobrini*. But some have been rightly of opinion, that the children of sisters are only properly called *consobrini*, quasi *consororini*;——that the children of brothers are properly called *fratres patrueles*, or brothers *patruel*, if males; and *sorores patruelcs*, or sisters *patruel*, if females;——and that, when there are children of a brother, and children of a sister, they are properly called *amitini*; but the sons of your aunt by the father's side call you *consobrinus*, and you call them *amitini*.

Fifth Degree.

III. A great-grand-father's grand-father, or a great-grand-father's grand-mother, is in the fifth degree in the line ascending, and a great-grandson, or a great-grand-daughter, of a grandson or grand-daughter, is in the fifth degree in the line descending. And, in the transverse or collateral line, a great-grandson, or great-grand-daughter, of a brother or sister, is also in the fifth degree: and consequently a great-grand-father's brother or sister, or a great-grand-mother's brother or sister, is in the fifth degree. The son or daughter also of a cousin german is in the fifth degree; and so is the son or daughter of a great uncle or great aunt, paternal or maternal; and such son, or daughter, is called *propior sobrino* and *propior sobrina*.

Sixth Degree.

IV. A great-grand-father's great-grand-father, or a great-grand-father's great-grand-mother, is in the sixth degree in the

line ascending; and the great-grandson, or great-grand-daughter of a great grand-son, or a great-grand-daughter, is likewise in the sixth degree in the line descending. And, in the transverse or collateral line, a great-great-grandson, or a great-great-grand-daughter, of a brother or sister, is also in the sixth degree: and consequently a great-great-grand-father's brother or sister, and a great-great-grand-mother's brother or sister, is in the sixth degree. And the son or daughter of a great-great-uncle, or great-great-aunt, paternal or maternal, is also in the sixth degree; and so also is the son or daughter of the son or daughter of a great-uncle or great-aunt, paternal or maternal. The grandson also, or the grand-daughter, of a cousin german, is in the sixth degree; and, in the same degrees between themselves, we reckon the *sobrini* and the *sobrinæ*; that is, the sons and daughters of cousins german in general, whether such cousins german are so related by two brothers, or by two sisters, or by a brother and a sister.

Of the other Degrees.

V. It is sufficient to have shewn thus far, how the degrees of *cognation* are enumerated: and, from the examples given, it is evident in what manner we ought to compute the more remote degrees; for every person generated always adds one degree; so that it is much easier to determine, in what degree any person is related to another, than to denote such person by a proper term of *cognation*.

Of the Degrees of Agnation.

VI. The degrees of *agnation* are enumerated in the same manner as the degrees of *cognation*.

TITLE VII.

Of Servile Cognation.

IT is certain, that the part of the edict, in which the possession of goods is promised, according to the rights of proximity, does not relate to servile *cognation*; neither hath such *cognation* been regarded by any antient law. But, by our own constitution, concerning the rights of patronage, which right was heretofore obscure, and every way confused, we have ordained (humanity so suggesting) that, if a slave shall have a child, or children, either by a free-woman or by a bond-woman, with whom he lives *in contubernio*, and, on the contrary, that if a bond-woman shall have a child, or children, of either sex, by a freeman, or by a slave, with whom she lives *in contubernio*, and such father and mother are afterwards infranchised, the children shall succeed to their

father or mother, no regard being paid to the right of patronage. And we have not only called these children to the succession of their parents, but also to succeed each other mutually, whether they are sole in succession, having all been born in servitude and afterwards manumitted, or whether they succeed with others, who were conceived after the infranchisement of their parents, and whether they are all by the same father and mother, or by a different father, or a different mother. And, in brief, we have been willing, that children born in slavery, and afterwards manumitted, should succeed in the same manner as those who are the issue of parents legally married.

Collation of Orders and Degrees.

I. By what we have already said, it appears, that those, who are in an equal degree of *cognation*, are not always called equally to the succession; and farther, that even he who is the nearest of kin, is not constantly to be preferred. For, inasmuch as the first place is given to *proper heirs*, and to those who are numbered with proper heirs, it is apparent, that the great-grandson, or great-great-grandson, is preferred to the brother, or even the father or mother of the deceased: although a father or mother, (as we have before observed,) obtain the first degree of relation, a brother the second, a great-grandson the third, and a great-great-grandson the fourth: neither does it make any difference, whether such grand-children were under the power of the deceased at the time of his death, or out of his power; either by being emancipated, or by being the children of those who were emancipated: neither can it be objected, that they are descended by the female line. But, when there are no proper heirs, nor any of those who are permitted to rank with them, then an *agnate*, who hath the full right of *agnation* in him, although he is in the *most distant* degree, is generally preferred to a *cognate*, who is in the nearest degree; thus the grandson, or great-grandson of a paternal uncle is preferred to an uncle or aunt, who is maternal. We therefore observe, that, when there are no proper heirs, nor any who are numbered with them, nor any who ought to be preferred by the right of *agnation*, (as we have before noted,) then he who is in the nearest degree of *cognation*, is called to the succession; and that, if there are many in the same degree, they are all called equally. But a brother and sister, although emancipated, are yet called to the succession of brothers and sisters; for, although they have suffered diminution, they are nevertheless preferred to all *agnates* of a more remote degree.

TITLE VIII.

Of the Succession of Freed-men.

Of the Law of the Twelve Tables.

LET us now treat of the succession of freed-men. A freed-man had it formerly in his power, without being subject to any penalty, wholly to omit in his testament any mention of his patron; for the law of the twelve tables called the patron to the inheritance, only when the freed-man died intestate, and without *proper heirs*; and therefore, though a freed-man had died intestate, yet, if he had left a proper heir, the patron would have received no benefit: and, indeed, when the natural and legitimate children of the deceased became his heirs, there seemed no cause of complaint; but, when the freedman left only an adopted son, it was manifestly injurious that the patron should have no claim.

Of the Prætorian Edict.

I. The law was therefore afterwards amended by the edict of the prætor: for every freedman, who made his testament, was commanded so to dispose of his effects, as to leave a moity to his patron: and, if the testator left nothing, or less than a moity, then the possession of half was given to the patron *contra tabulas*, i. e. contrary to the disposition of the testament. And, if a freed-man died intestate, leaving an adopted son his heir, the possession of a moity of the effects was in this case also given to the patron, notwithstanding such heir: yet not only the natural and lawful children of a freed-man, whom he had under his power at the time of his death, excluded the patron, but those children also, who were emancipated, and given in adoption, if they were written heirs for any part, or even, although they were omitted, if they had requested the *possession* CONTRA TABULAS, by virtue of the *prætorian edict*. But disinherited children by no means repelled the patron.

Of the Papian Law.

II. But afterwards the rights of those patrons, who had wealthy freed-men, were enlarged by the *Papian* law; by which it is provided, that an equal share shall be due to the patron out of the effects of his freed-man, whether dying testate or intestate, who hath left a patrimony of an hundred thousand *sestertii* and fewer than three children: so that, when a freed-man hath left only one son or daughter, then a moity of the effects is due to the patron, as if the deceased had died testate, without either son or daughter. But, when there are two heirs, male or female, a third part only is due to the patron; and when there are three, the patron is wholly excluded.

Of the Constitution of Justinian.

III. But by our imperial constitution, (which we have caused to be promulged in the Greek language, for the benefit of all nations), we have ordained, that, if a freed-man, or freed-woman, dies possessed of less than an hundred *aurei*, (for thus have we interpreted the sum mentioned in the *Papian law*, counting one *aureus* for a thousand *sestertii*,) the patron shall not be entitled to any share in the succession, where there is a will. But, if either a freed-man, or freed-woman, dies intestate, and without children, we have in this case reserved the right of patronage entire, as it formerly was, according to the law of the twelve tables. But, if a freed person dies worth more than an hundred *aurei*, and leaves one child, or many, of either sex or any degree, as the heirs and possessors of his goods, we have permitted, that such child or children shall succeed their parent, to the intire exclusion of the patron and his heirs: and, if any freed persons die without children and intestate, we have called their patrons or patronesses to their whole inheritances. And if any freed person, worth more than an hundred *aurei*, hath made a testament, omitted his patron, and left no children, or hath disinherited them; or if a mother, or maternal grand-father, being freed persons, have omitted to mention their children in their wills, so that such wills cannot be proved to be inofficious, then, by virtue of our constitution, the patron shall succeed, not to a moity as formerly, but to the third part of the estate of the deceased, by the possession of the goods, called *contra tabulas:* and, when freed persons, men or women, leave less than the third part of their effects to their patrons, our constitution ordains, that the deficiency shall be supplied; and that this third part, due to patrons, shall not be subject to the burden of *trusts*, or legacies, even for the benefit of the children of the deceased: for the co-heirs only of the patron shall be loaded with this burden. In the before-mentioned constitution, we have collected many more cases, which we have thought necessary in relation to the right of patronage, that patrons and patronesses, their children and collateral relations, as far as the fifth degree, might be called to the succession of their freed-men and freed-women; as will appear more fully from our ordinance itself. And, if there are many children of one patron or patroness, or of two or more patrons or patronesses, he, who is nearest in degree, is called to the succession of his freed-man or freed-woman; and, when there are many in equal degree, the estate must be divided *in capita*, and not *in stirpes*; and the same order is decreed to be observed among the collaterals of patrons

and patronesses: for we have rendered the laws of succession almost the same in regard to the *ingenui* and *libertini*.

Who succeed to Freed-men.

IV. But what we have said relates to the *libertini* of the present time, who are all citizens of *Rome*; for there is now no other species of freed-men; that of the *Dedititii* and *Latini* being abolished: the latter of whom never enjoyed any right of succession; for although they led the lives of freed-men, yet, with their last breath, they lost both their lives and liberties: for their possessions, like the goods of slaves, were detained by their manumittor, who possessed them, as a *peculium*, by virtue of the law *Junia Norbana*. It was afterwards provided by the *senatus-consultum Largianum*, that the children of a manumittor, who were not nominally disinherited, should be preferred to any strangers, whom a manumittor might constitute his heirs; then followed the edict of *Trajan*, which ordained, that, if a slave either against the will, or without the knowledge of his patron, should obtain the freedom of *Rome* by the favour of the emperor, such slave shall continue free, whilst living, but, at his death, should be regarded only as a *Latin*. But we, being averse to these changes of condition, and dissatisfied with the difficulties attending them, have thought proper, by virtue of our constitution, for ever to abolish, together with the Latins, the law *Junia*, the *senatus-consultum Largianum*, and the edict of *Trajan*; to the intent, that all freed-men may become freed-men of *Rome*. And we have happily contrived by some additions, that the manner of conferring the freedom of *Latins* should now become the manner of conferring the freedom of *Rome*.

TITLE IX.

Of the Assignment of Freed-men.

IN regard to the possession of freed-men it must be remembered, that the senate hath decreed, that, although the goods of freed-men belong equally to all the children of the patron, who are in the same degree, yet it is lawful for a parent to assign a freed-man to any one of his children, so that, after the death of the parent, the child, to whom the freed-man was assigned, is solely to be esteemed his patron: and the other children, who would have been equally admitted to a dividend of the goods of the freed-man, had he not been assigned, are wholly excluded; but, if the assignee happens to die without issue, the excluded children regain their former right,

Of the Sex of the Assigned.

I. Every freed-person is assignable, whether man or woman; and an assignment may be made not only to a son or grandson, but to a daughter or grand-daughter.

Of Children.

II. The power of assigning freed-persons is given to him, who hath two or more children unemancipated, so that a father may assign a freed-man or freed-woman to those children, whom he retains under his power: and hence it became a question, if a father should assign a freed-man to his son and afterwards emancipate that son, whether the assignment would, or would not be null? and the decision hath been in the affirmative; which hath been approved of by Julian and many others.

How this Assignment is to be made.

III. But it makes no difference, whether the assignment of a freed-man is made by testament, or not by testament; for patrons may assign even by word of mouth; which was permitted by the *senatus-consultum*, made in the reign of Claudian in the consulate of Sabellius Rufus and Asterius Scapula.

TITLE X.

Of the Possession of Goods.

THE right of succeeding by the possession of goods was introduced by the prætor, in amendment of the ancient law; which he corrected, not only in regard to the inheritances of intestates, (as we have before observed;) but in regard also to the inheritances of those, who die testate: for, if a posthumous stranger was instituted an heir, although he could not enter upon the inheritance by the civil law, inasmuch as his institution as heir would not be valid, yet by the prætorian or honorary law he might be made the possessor of the goods, when he had received the assistance of the *prætor*. But such stranger may at this time, by virtue of our constitution, be legally instituted an heir, being no longer regarded as a person unknown to the civil law. But the prætor sometimes bestows the possession of goods, intending neither to amend nor impugn the old law, but only to confirm it; for he gives the possession of goods *secundum tabulas* to those, who are appointed the heirs of the deceased by a regular testament. He also calls *proper heirs* and *agnates* to the possession of the goods of intestates; and yet the inheritance would be their own by the *civil law*, although the prætor did not interpose his authority. But those, whom the prætor calls to an inheritance

merely by virtue of his office, do not become legal heirs; inasmuch as the prætor cannot make an heir; for heirs are made only by law, or by what has the effect of a law, as a decree of the senate, or an imperial constitution. But, when the prætor gives any persons the possession of goods, they stand in the place of heirs, and are called the possessors of the goods. But the prætor hath also devised many other orders of persons, to whom the possession of goods can be granted, to the intent, that no man may die without a successor: and, by the rules of justice and equity, he hath greatly enlarged the right of taking inheritances, which was bounded within the most narrow limits by the laws of the twelve tables.

Prætorian Possessions.

I. The kinds or species of the possessions of goods or prætorian successions, when there is a testament, are the following. The first is that possession, which is given to children, of whom no mention is made in the testament; and this is called *possessio contra tabulas*; i. e. a possession contrary to the testament. The second is that which the prætor promises to all written heirs, and it is therefore called *secundum tabulas*; i. e. a possession according to the testament. These being fixed, the prætor proceeded to the possession of goods in regard to intestates;——and first he gives the possession of goods, called *unde liberi*, to the proper heirs, or to those, who by the prætorian edict, are numbered among the proper heirs:——secondly, to the legitime heirs:——thirdly, to ten persons, in preference to a stranger, who was the manumittor, viz. to a father, a mother, or a grand-father or grand-mother, paternal or maternal; to a son, a daughter, or to a grandson or grand-daughter, as well by a daughter as by a son; to a brother or sister, either consanguine or uterine:——fourthly, to the nearest *cognates*:——fifthly, to those who are, as it were, of the family, *tanquam ex familia*:——sixthly, to the patron or patroness, and to their children, and their parents:——seventhly, to a husband and wife:——eighthly, to the *cognates* of a manumittor or patron.

A new Law.

II. The prætor's authority hath introduced these successions; but we, not suffering any useless institutions to continue in the law, have nevertheless admitted by our constitutions the possession of goods *contra tabulas* and *secundum tabulas*, as necessary; and also the possessions of goods *ab intestato*, called *unde liberi* and *unde legitimi*; but we have briefly shewed, that the possession called *unde decem personæ*, which was ranked by the præ-

tor's edict in the fifth order, was unnecessary: for, whereas that possession preferred ten kinds of persons to a stranger, who was the manumittor at emancipation, our constitution, which regards emancipation, hath permitted all parents to manumit their children, a fiduciary contract being presumed; so that the possession *unde decem personæ* is now useless. The afore-mentioned fifth possession being thus abrogated, we have now made that the fifth, which was formerly the sixth, by which the prætor gives the succession to the nearest cognates. And, whereas formerly the possession of goods, called *tanquam ex familia*, was in the seventh place, and the possession of goods called *unde patroni patronæque, liberi et parentes eorum*, was in the eighth, we have now annulled them both by our ordinance concerning the right of patronage. And having brought the successions of the *libertini* to a similitude with those of the *ingenui*, (except that we have limited the former to the fifth degree, so that there may still remain some difference between them,) we think that the possessions *contra tabulas—unde legitimi*—and *unde cognati*, may suffice, by which all persons may vindicate their rights, the niceties and inextricable errors of those two kinds of possessions, *tanquam ex familia* and *unde patroni*, being removed. The other possession of goods, called *vir et uxor*, which held the ninth place among the antient possessions, we have preserved in full force, and have placed in an higher degree, namely, the sixth. The tenth of the antient possessions, called *unde cognati manumissoris*, being deservedly abrogated for causes already enumerated, there now remain only in force six ordinary possessions of goods.

Extraordinary Possession.

III. But to these a seventh possession hath been added, which the prætors have introduced with the greatest reason: for, by edict, this possession of goods is promised to all those, to whom it is appointed to be given by any law, senatus-consultum, or constitution: and the prætor hath not positively numbered this possession of goods either with the possessions of the goods of intestate or testate persons, but hath given it, according to the exigence of the case, as the last and extraordinary resource of those, who are called to the successions of testates or intestates, by any particular law, any decree of the senate, or any new constitution.

Of the Successory Edict.

IV. The prætor, having introduced many kinds of successions, and ranked them in order, hath thought proper, inasmuch as many persons of different degrees are often found in one species of succession, to limit a certain time for demanding the possession

of goods, to the intent, that the actions of creditors may not be delayed for want of a proper person, against whom to bring them, and that the creditors themselves may not obtain the possession of the effects of the deceased too easily, and so consult solely their own advantage: therefore, to parents and children, whether natural or adopted, the prætor hath given the space of one year, in which they may either accept or refuse the possession of goods. But to all other persons, agnates or cognates, he allows only a hundred days.

Of the Right of Accretion.

V. And, if any person intitled does not claim the possession of goods within the time limited, his right of possession accrues first to those in the same degree with himself; and, in default of persons in the same degree, then the prætor, by the successory edict, bestows the possession of goods upon those in the next degree, as if he who preceded had no right. And, if any man refuses the possession of goods, when it is open to him, there is no necessity to wait till the time limited is expired, but those who are the next in succession may be instantly admitted by virtue of the before-mentioned edict.

VI. It is here to be observed, that, in regard to the time prescribed for demanding the possession of goods, we count all the days which are *utiles*; i. e. those days on which the party, having knowledge that the inheritance is open to him, might apply to the judge.

Form of demanding.

VII. The emperors, our predecessors, have wisely provided in this case, that no person need be solicitous to demand the possession of goods in solemn form: for, if by any act it manifestly appears, that a man has in any manner consented to accept the prætorian succession within the prescribed time, he shall enjoy the full benefit of it.

TITLE XI.

Of Acquisition by Arrogation.

THERE is also an universal succession of another kind, which was introduced neither by the laws of the twelve tables, nor by the edict of the prætor, but by that law which takes its rise from general consent and usage.

What Things are thus acquired.

I. For example, if the father of a family gave himself in arrogation, all things which appertained to him, whether corporeal or

incorporeal, and whatever was due to him, became antiently the property of the arrogator; those things only excepted, which perished by diminution or change of state; as the duties of freed-men to their patrons and the rights of agnation. But, although use and usufruct were heretofore numbered among those rights which perished by diminution, yet our constitution hath prohibited that the use and usufruct of things should be taken away by the least diminution or change of state.

New Law.

II. But we have now limited the acquisitions obtained by arrogation, in similitude of what is gained by natural parents: for nothing is now acquired either by natural or adoptive parents, but the bare usufruct of those things, which their children possess adventitiously and extrinsically in their own right, the property still remaining intire in the adopted or natural child. But, if an arrogated son dies under the power of his arrogator, then even the property of the effects of such son will pass to the arrogator in default of those persons, whom we have by our constitution preferred to the father in the succession of those things, which could not be acquired for him.

Effect of this Acquisition.

III. On the contrary an arrogator is not bound at law to satisfy the debts of his adopted son in consequence of a direct action; but yet he may be convened in his son's name; and, if he refuses to defend his son, then the creditors, by order of the proper magistrates, may seize upon and legally sell all those goods, of which the usufruct, as well as the property, would both have been in the debtor, if he had not made himself subject to the power of another.

TITLE XII.

New Species of Succession.

A NEW species of succession hath taken its rise from the constitution of Marcus Aurelius. For, if those slaves, to whom freedom hath been bequeathed, are desirous, for the sake of obtaining it, that the inheritance, which hath not been accepted by the written heir, should be adjudged for their benefit, they shall obtain their request.

Rescript of Marcus.

I. And to the same effect is the rescript of the emperor Marcus to Pompilius Rufus; the words of which are these: "If the estate of Virginius Valens, who by testament hath bequeathed to

certain persons their freedom, must necessarily be sold, and there is no successor *ab intestato*, then the magistrate, who has the cognizance of these affairs, shall upon application hear the merits of your cause, that, for the sake of preserving the liberty of those to whom it was given, either directly or in trust, the estate of the deceased may be adjudged to you, on condition, that you give good security to the creditors, to pay them the whole of their just demands. And all those to whom freedom was directly given, shall then become free, as if the inheritance had been entered upon by the written heir; but those, whom the heir was ordered to manumit, shall obtain their freedom from you only. And, if you are not willing that the goods of the deceased should be adjudged to you on any other condition, than that even they, who received their liberty directly by testament, shall also become your freedmen, we then order, that your will shall be complied with, if the persons agree to it who are to receive their freedom. And, lest the use and emolument of this our rescript should be frustrated by any other means, be it known to the officers of our revenue, that, whenever our exchequer lays claim to the estate of a deceased person, the cause of liberty is to be preferred to any pecuniary advantage; and that the estate shall be so seized, as to preserve the freedom of those who could otherwise have obtained it; and this in as full a manner, as if the inheritance had been entered upon by the testamentary heir."

Use of this Rescript.

II. The contents of this rescript are calculated not only in favor of liberty, but also for the benefit of deceased persons, lest their effects should be seized and sold by their creditors: for it is certain, that, when goods are adjudged to a particular man, for the preservation of liberty, a sale by creditors can never take effect: for he to whom the goods are adjudged is the protector of the deceased, and must always be a person who can give security for the full payment of creditors.

Its Application.

III. This rescript takes place, whenever freedom is conferred by testament. But, when a master dies intestate, having bequeathed freedom to his slaves by codicil, and his inheritance is not entered upon, what will then be the consequence? We answer, that the favour of the rescript shall extend to this case; but it is most certainly not to be doubted, that, if a master dies testate, and by codicil bequeaths freedom, the rescript shall be of full force.

IV. The words of the rescript shew, that it is then in force, when there is absolutely no successor *ab intestato.* It therefore follows, that, as long as it remains doubtful, whether there is or is not a successor, the constitution shall not take place: but, when once it is certain that no one will enter upon the succession, the ordinance shall then have its effect.

V. But, if he who has a right to be restored *in integrum* (as a minor, for example) should delay to take upon him the inheritance of his father, it may then be asked, whether, notwithstanding this right of being restored, the constitution shall take place, and an adjudication of the goods pass to a stranger, or one of the slaves? And again, it may be demanded, what will be the consequence, if, after an adjudication has been made for the sake of liberty, the heir should be restored *in integrum?* We answer, that freedom, when once obtained, shall not afterwards be revoked.

VI. This constitution was made for the protection of liberty; and therefore, when freedom is not given, the constitution has no effect. Suppose then, that a master hath given freedom to his slaves either *inter vivos* or *mortis causa*, and that they, to prevent the creditors from complaining that this was done to defraud them, should petition, that the estate of the deceased may be adjudged to them, are these persons to be heard? We answer, that we incline to grant their request, although in this case the letter of the constitution is deficient.

VII. But perceiving that the rescript was deficient in many respects, we enacted a most express constitution, containing many cases which explain the rights of succession in the fullest manner; of which every person who reads that constitution will be sensible.

TITLE XIII.

Claudian Decree.

THERE were many other kinds of universal successions before that, which we treated of in the foregoing title; as the *bonorum emptio*, which was first introduced, that the estates of debtors might be sold; but this was accompanied by many intricate and tedious proceedings; it continued nevertheless as long as the ordinary judgments were in practice; but, as soon as the extraordinary judgments were made use of, the solemn *emptio bonorum* ceased at the same time with the ordinary judgments. And creditors can now possess themselves of the goods of their debtors and dispose of them, as they think most proper, by the decree of a judge. But these points are treated of more perfectly and at

large in the books of our digests. There was also, by virtue of the Claudian decree, another universal acquisition called *miserabilis:* for example, if a free-woman had debased herself by being enamoured of a slave, she lost her freedom by the before named decree, and, together with her freedom, her estate and substance. But, it being our opinion, that this part of the decree was unworthy of our reign, and ought therefore to be expunged from our laws, we have not permitted it to be inserted in the digests.

TITLE XIV.

Of Obligations.

LET us now pass to obligations. An obligation is the chain of the law, by which we are necessarily bound so make some payment, according to the laws of our country.

I. Obligations are primarily divided into two kinds, *civil* and *prætorian. Civil* obligations are those, which are constituted by the laws, or by any species of the civil law. *Prætorian* obligations are those, which the prætor hath appointed by his authority; and these are also called *honorary.*

II. The second or subsequent division of obligations contains four species; for some obligations arise by *contract*, others by *quasi-contract*; some by *malefeasance*, and others by *quasi-malefeasance.* We must first treat of those obligations, which arise from a *contract*; and of these there are also four kinds: for obligations are contracted by the thing itself, by word of mouth, by writing, or by the mere consent of parties. Let us now take a separate view of each of these methods of contracting.

TITLE XV.

Of the different modes of Obligation.

Of Loan.

AN obligation is contracted by the thing itself; that is, by the delivery of it, as a loan or *mutuum:* and any particular thing, which consists of weight, number, or measure, as wine, oil, corn, coin, brass, silver, gold, may be delivered as a *mutuum*; and these substances, when so delivered, become in specie the absolute property of the receiver: and, since the very identical things lent cannot be restored, but others of the same nature and quality must be paid in lieu of them, this loan is therefore called a *mutuum*; for in this case *I so give, that what is mine may become yours: ut ex* MEO TUUM *fiat.* From this contract arises that action, which is called *certi condictio.*

Of erroneous Payment.

I. He also, who hath received what was not due to him, it being paid or delivered by mistake, is bound by the thing received, so that an action of condiction lies against him for the recovery of the thing, at the suit of him, who paid or delivered it erroneously. And this action may be brought against the receiver in these words, *si apparet, eum dare opportere*; in the same manner, as if he had accepted the thing delivered, as a *mutuum*. And hence it is, that a pupil, when a payment of any thing not due hath been made to him without the authority of his *tutor*, is not subject to the action called *condictio indebiti*; because he is not subject to an action on account of the delivery of the thing, as a *mutuum*. And yet this species of obligation does not seem to proceed from a contract; since he, who pays with an intention to satisfy his debts, appears more willing to dissolve, than to make, a contract.

Of Commodation.

II. He also, to whom the use of any particular thing is granted or *commodated*, is bound by the delivery of the thing, and is subject to an action called *commodataria*. But such person widely differs from him, who hath received a *mutuum*: for a *commodatum*, or thing lent, is not delivered, to the intent that it should become the property of the receiver; and therefore he is bound to restore the identical thing, which he hath received. There is also another difference; for he, who hath accepted a *mutuum*, is not freed from his obligation, if even by any accident, as by the fall of an edifice, fire, shipwreck, thieves, or the incursions of an enemy, he hath lost what he hath received: but he, who hath received a *commodatum*, or a thing lent for his use only, is indeed commanded to employ his utmost diligence in keeping and preserving it; (and it will not suffice, that he hath taken the same care of it, which he was accustomed to take of his own property, if it appears, that a more diligent man might have preserved it;) yet, if it is evident, that the loss of it was occasioned by a superior force, or some extraordinary accident, and not by any fault, he is then not obliged to make good the loss; but, if a man by choice will travel with what he has received as a *commodatum* or loan, and should lose it by shipwreck, or by the incursion of enemies, or robbers, it is not to be doubted, but that he is bound to make restitution, or to pay an equivalent. A thing is properly said to be lent or *commodated*, when one man permits another to enjoy the use of it, and receives nothing by way of hire: but, if a price for hire is paid, the thing is *let*, and not *lent*; for a *commodatum*, or loan, must be gratuitous.

Of a Deposit.

III. Any person, who is entrusted with a deposit, is bound by the delivery of the thing, and is subject to an action of deposit, because he is under an obligation of making restitution of that very thing, which he received. But a depositary is only thus answerable on account of fraud; for where a fault only can be proved against him, such as negligence, he is under no obligation; and he is therefore secure, if the thing deposited is stolen from him, even although it was carelessly kept. For he, who commits his goods to the care of a negligent friend, should impute the loss of them, not to his friend, but to his own facility and want of caution.

Of a Pledge.

IV. A creditor also, who hath received a pledge, is bound by the delivery of it; for he is obliged to restore the very thing, which he hath received, by the action called *pigneratitia*. But, inasmuch as a pledge is given for the mutual service of both debtor and creditor, (of the debtor, that he may obtain the money the more easily, and of the creditor, that the repayment may be the better secured,) it will suffice, if the creditor shall appear to have used an exact diligence in keeping the thing pledged: for, if such diligence appears to have been used, and the pledge was lost by mere accident, the law secures the creditor, as to the loss of the thing pledged, and he is by no means impeded to sue his debt.

TITLE XVI.

Of Obligation by Words.

AN obligation in words is made by question and answer, when we stipulate, that any thing shall be given or done; and from hence arise two actions, viz. the action called *condictio certi*, when the stipulation is certain; and the action called *condictio ex stipulatu*, when the stipulation is uncertain. This obligation is called a stipulation, because whatever was firm was termed *stipulum* by the ancients; the word *stipulum* being probably derived from *stipes*, denoting the trunk of a tree.

Of the Words of Stipulation.

I. The following words were formerly used in all verbal obligations.

Spondes? Spondeo.
Promittis? Promitto.
Fide-promittis? Fide-promitto.

Fide-jubes? Fide-jubeo.
Dabis? Dabo.
Facies? Faciam.

And it is not material, whether the stipulation is conceived in Latin, Greek, or any other language, if the stipulating parties understand it: neither is it necessary, that the same language should be used by each person; for it is sufficient, if a congruent and pertinent answer is made to each question. It is moreover certain, that two Greeks may contract in Latin. Anciently indeed it was necessary to use those solemn words before recited; but the constitution of the Emperor *Leo* was afterwards enacted, which takes away this verbal solemnity, and requires only the apprehension and consent of each party, expressed in any form of words.

Of Pure Stipulation.

II. Every stipulation is made to be performed simply, or at a day certain, or conditionally. A stipulation is made to be performed simply, when a man says do you promise to pay me five Aurei? and, in this case, the money may be instantly demanded. A stipulation is made to be performed at a day certain, when the day is added, on which the money is to be paid; as when a man says "do you promise to pay me ten Aurei on the first of March?" but note, that what we stipulate to pay at a day certain, though it becomes immediately due, yet it cannot be demanded before the day comes; nor can it even then be sued; for the whole day must be allowed for payment; because it can never be certain, that there hath been a failure of payment on the day promised, until that day is quite expired.

III. But, if a man thus stipulates; viz. do you promise to give me ten Aurei annually, as long as I live? the obligation is understood to be made purely or simply, and becomes perpetual so as to bind the heirs of the obligor; for an obligation cannot continue due for a time certain only: yet, if the heir of the stipulator demands payment, he shall be barred by an exception of agreement.

Of Conditional Stipulation.

IV. A stipulation is conditional, when an obligation is referred to an accident, and depends upon some thing to be done or not done, to happen or not to happen, before the stipulation can take effect: for instance, if a man stipulates thus; "do you promise to pay me five Aurei, if Titius is made a consul?" or thus, "do you promise to pay me five Aurei, if I do not ascend the capitol?" which last stipulation is in effect the same, as if he had stipulated, that five Aurei should de paid to him at the time of his death.

It is to be observed, that, in every conditional stipulation, there is only an hope, that the thing stipulated will become due; and this hope a man transmits to his heirs, if he dies before the event of the condition.

Of Place.

V. Even places are often inserted in a stipulation; as for example, "do you promise to give me such a particular thing at Carthage?" and this stipulation, though it appears to be made simply, yet in reality carries with it a space of time, which the obligor may make use of to inable himself to pay the money promised at Carthage. And therefore, if a man at Rome should stipulate in these words, "do you promise to pay me a sum of money this day at Carthage?" the stipulation would be null, because the performance of it would be impossible.

Of Conditions as respects Time.

VI. Conditions, which relate to time present or past, either instantly annul an obligation, or instantly inforce it; for example, if a man should thus stipulate, "do you promise me the payment of a sum of money, if Titius hath ever been a consul?" or thus, "if Mævius is now living?" if these things are not so, that is, if Titius hath never been a consul, and Mævius is not now living, the stipulation is void; and if they are so, that is, if Titius hath been a consul, and Mævius is actually living, then the stipulation is good and may be inforced; for events, which in themselves are certain, delay not the performance of an obligation, although to us they are not certain.

The Subjects of Stipulation.

VII. Not only things, as a field, a slave, or a book, but also acts, may be the subject of stipulations; as when we stipulate, that something shall, or shall not be done. And, in these stipulations, it will be right to subjoin a penalty, lest the value of the stipulation should be uncertain, and the demandant should therefore be forced to prove how far he is interested in it. And therefore, if a man stipulates, that something shall be done, a penalty ought to be thus added; "do you not promise to pay me ten AUREI, as as a penalty, if the act stipulated is not performed?" But, if it is agreed in the same obligation, that some things shall be done, and that others shall not be done, then ought some such clause, as the following, to be added; "do you promise to pay me ten AUREI, as a penalty, if any thing is done contrary to agreement; or if any thing is not done according to our agreement?

TITLE XVII.

Of the Parties Stipulating.

TWO or more persons may stipulate, and two or more may become obligors. The stipulating parties are bound, if, after all questions have been asked, the obligor answers, "I promise;" as when, for example, the obligor thus answers two persons separately stipulating, "I promise to pay each of you." For, if he first promises Titius, and afterwards promises another, who interrogates him, there will then be two obligations, and not two stipulators to one obligation. Two or more become obligors, if, after they have been thus interrogated, "Mævius, do you promise to pay us ten AUREI? and, Seius, do you promise to pay us the same ten AUREI?" they each of them answer separately, "I do promise."

I. By these stipulations and obligations the whole sum stipulated becomes due to every person stipulating, and every obligor is bound for the payment of the whole. But as one and the same thing is due by each obligation, therefore any one of the stipulators by receiving the debt, and any one of the obligors by paying it, discharges the obligation of the rest, and frees all parties.

II. Where there are two obligors, the one may bind himself purely and simply, and the other may oblige himself only to make payment on a day certain, or upon condition: but neither the day certain, nor the condition, will secure the person, who is simply bound, from being sued for the payment of the whole.

TITLE XVIII.

Of the Stipulations of Slaves.

A SLAVE obtains the liberty of stipulating from the person of his master; but in many instances the inheritance represents the person of a master deceased: and therefore whatever an hereditary slave stipulates for, before the inheritance is entered upon, he acquires it for the inheritance; and of course for him, who afterwards becomes the heir.

Of the effect of Stipulation by a Slave.

I. A slave, let him stipulate how he will, for his master, for himself, for a fellow slave, or generally without naming any person, always acquires for his master. And the same obtains among children, who are under the power of their father, in regard to those things, which they can acquire for him.

Of the Stipulation of an Act.

II. But, when a fact or thing to be done is contained in a stipulation, the person of the stipulator is solely regarded; so that, if even a slave stipulates, that he shall be permitted to pass through a field, and to drive beasts or a carriage through it, it is not the master, but the slave only, who is to be permitted to pass.

Of a Slave in common.

III. If a slave, who is in common to several masters, stipulates, he acquires a share for each master according to the proportion, which each has in the property of him. But, if such slave should stipulate at the command of any particular master, or in his name, the thing stipulated will be acquired solely for that master. And whatever a slave in common to two masters stipulates for, if part cannot be acquired for one master, the whole shall be acquired for the other; as when the thing stipulated already belongs to one of the two.

TITLE XIX.

Of the Division of Stipulation.

SOME stipulations are judicial, others prætorian, others conventional; and others common; that is, both prætorian and judicial.

Of judicial Stipulations.

I. The judicial are those which proceed merely from the office of the judge; as when security is ordered to be given against fraud, or for pursuing a slave, who hath fled, or for paying the price of him.

Of Prætorian Stipulations.

II. The prætorian stipulations are those, which proceed from the mere office of the prætor; as when security is ordered to be given *pro damno infecto*; that is, on account of damage not yet done, but likely to happen; and for the payment of legacies. And note, that under prætorian stipulations we comprehend the Edilitian; for these proceed from the jurisdiction of the prætor.

Of Conventional Stipulation

III. Conventional stipulations are those, which are made by the agreement of parties; that is, neither by order of a judge or prætor, but by the consent of the persons contracting; and of these stipulations there are as many kinds, as of things to be contracted for.

Of Common.

IV. Common stipulations are those, which are ordered for the security of the effects of a pupil, (for the prætor ordains a caution to be given on this account, and sometimes a judge decrees it, when there is an absolute necessity,) or for the ratification of a thing done in another's name.

TITLE XX.

Of ineffective Stipulations.

EVERY thing, of which we have the property, may be brought into stipulation, whether it is moveable or immoveable,

Of what does not exist.

I. But, if a man hath stipulated, that a thing shall be given, which does not, or can not exist, as for instance, that *Stichus*, the slave, who is dead, but is thought to be living, or that a Centaur, who cannot exist, should be given to him, the stipulation is of no force.

Of Things not in Commerce.

II. And the law is the same, if a thing sacred, which was thought to be not so, is brought into stipulation; or if a man stipulates for a thing of constant public use, as a forum or a theatre; or for a free person, who was thought to be bond; or for a thing, which he cannot acquire; or for some thing, which is already his own: nor shall any such stipulation continue in suspense, because a thing public may become private, a freeman may turn slave, a stipulator may become capable of acquiring, or because what now belongs to the stipulator may cease to be his; but every such stipulation shall be instantly void. And, on the contrary, although a thing may properly be brought into stipulation at first, yet, if it afterwards falls under the class of any of the things before mentioned without the fault of the obligor, the stipulation is extinguished. And such a stipulation, as the following shall never be valid:—for instance, "do you promise to give me Lucius Titius, when he shall become a slave?" for those things, which in their natures are exempt from our dominion, are by no means to be brought into obligation.

Of an engagement for others.

III. If a man promises, that another shall give or do something, such promissor shall not be bound; as if a man should promise, "that Titius shall pay five Aurei:" but, if he promises, that he will cause *Titius* to pay five *Aurei*, his promise shall be binding.

Of Payment by another.

IV. If a man stipulates for any other, than for him, to whom he is subject, such stipulation is a void act: but nevertheless a payment of a thing promised may be made to a stranger; as if a man should thus stipulate, *do you promise to make payment to me, or to Seius?* for, when the obligation is to the stipulator, the payment may well be made to *Seius*, though against his will: and this is allowed in favor of the debtor, that he may be legally

freed from his debt: and the stipulator, if there is occasion, may have an action of mandate against *Seius*. And, if a man should stipulate, that ten *Aurei* shall be paid to him and to another, not under his power, the stipulation would be good: yet it hath been a doubt, whether the whole sum due would be due to the stipulator, or only a moity; and it hath been resolved, that the stipulator in this case acquires a moity only. But, if you stipulate for another, who is subject to your power, you acquire for yourself; for your own words are reputed your son's, and your son's words are reputed yours, in regard to all those things, which can possibly be acquired for you.

Of Interrogation and Response.

V. A stipulation is void, if the party interrogated does not answer pertinently to the demand made; as when a person stipulates, that ten *aurei* shall be paid him, and you answer five; or, *vice versa*, if he stipulates for five, and you answer, *I promise ten.* A stipulation is also void, if a man stipulates simply, and you promise conditionally; or, on the contrary, if he stipulates conditionally, and you answer purely, and in express terms; that is, if, when a man is stipulating conditionally or at a day certain, you answer him thus; *I promise you payment on this present day.* But, if you answer only, *I promise*, you seem in brief speech to agree to his *day* or *condition.* For it is not necessary, that in the answer every word should be repeated, which the stipulator expressed.

Of Stipulations by those under Power.

VI. A stipulation is also void, if you stipulate with him, who is in subjection to your power, or if he stipulates with you. For a slave is not only incapable of entering into an obligation with his master, but is also incapable of binding himself to any other person. But the son of a family can enter into an obligation with any other person, except his father.

Of the Deaf.

VII. It is evident, that a dumb man can neither stipulate, nor promise: and the same law is received in regard to deaf persons; for he, who stipulates, ought to hear the words of the obligor; and he, who promises, the words of the stipulator. But we speak not of him, who hears with difficulty, but of him, who has no hearing.

Of the Insane.

VIII. A madman can transact no business, because he understands not what he does.

Of Pupils.

IX. A pupil is capable of transacting any business, if his tutor consents, where his authority is necessary; as it certainly is, when the pupil would bind himself: but a pupil can stipulate or cause others to be bound to him, without the authority of his tutor. What we have said of pupils must be understood of those, who have some understanding; for an infant, or one next to an infant, differs but little from a person out of his senses: for pupils of such an age have no understanding: but a more favorable interpretation is given to the law in regard to those, who are but little removed from infancy, whenever their own utility is concerned; so that they are then allowed the same rights, as those, who are near the age of puberty. But a son, who is under the power of his father, and within the age of puberty, cannot bind himself, even although his father consents, and authorises the transaction.

Of impossible Conditions.

X. If an impossible condition is added to an obligation, the stipulation is null; and that condition is reckoned impossible, of which nature forbids the event: as, for example, if a man should say, *do you promise me ten Aurei, if I touch the heavens with my finger?* but suppose a stipulation to be thus made; "do you promise me payment, if I do not touch the sky with my finger?" such a stipulation would be understood to cause a simple obligation, the performance of which might be instantly demanded.

Of Absence.

XI. A verbal obligation, made between absent persons, is also void. But, when this doctrine afforded matter of strife to contentious men, alleging after some time past, that either they or the other parties were not present, we issued our constitution, addressed as a rescript to the advocates of *Cæsarea*, which effectually provided for the speedy determination of such suits: and by this we have ordained, that full credit shall be given to those written acts, or instruments, which declare, that the contracting parties were present, unless the party, who alleges absence, makes it evident by the most manifest proofs either in writing or by witnesses, that either he, or his adversary, was in some other place, during the whole day, in which the instrument was made.

Of Stipulation as respects Death.

XII. A man could formerly no more stipulate, that a thing should be given him after his own death, than he could stipulate, that a thing should be given him after the death of the obligor. Neither could any person under the power of another stipulate, that any thing should be given him after his death, because such

person would appear to speak the words of his father or master. And, if a man had stipulated in this manner, "do you promise to give me five aurei the day before I die?" or "the day before you die?" the stipulation was also invalid. But since all stipulations, as we have already said, take their rise and force from the consent of the contracting parties, we have thought it proper to introduce a necessary emendation in this respect, so that, whether it is stipulated that a thing should be given after, or immediately before, the death either of the stipulator, or the obligor, the stipulation shall be good.

Of preposterous Stipulation.

XIII. Also, if a man had stipulated in these words, "do you promise me a sum of money to-day, if a certain ship arrives to-morrow from Asia?" the stipulation would have been invalid, because preposterously conceived. But, since the emperor Leo, of renowned memory, was of opinion, that such stipulations ought not to be rejected in regard to marriage portions, it hath pleased us also to give a fuller force to this doctrine by ordaining, that every stipulation of like import shall hold good, not only in marriage portions, but likewise in all other contracts.

Of Stipulation at the Time of Death.

XIV. If a stipulation had been conceived in the following words; "dou you promise to give me ten aurei at the time when I shall die?" or thus, "at the time when you shall die?" it was good by antient law, and is now valid.

XV. We may also legally stipulate that a thing shall be given, after the death of a third person.

Of written Promise.

XVI. If it is written in an act or instrument, properly attested, that a man hath entered into an obligation by promise, it will be always presumed, that the promise was in answer to a precedent interrogation, and that every thing was done regularly.

XVII. When many things are comprehended in one stipulation, a man binds himself to give them all, if he answers simply, "I promise." But, if he promises to give one, or some of the things stipulated, an obligation is contracted only in respect to those things which he promised to give. For, where there are many stipulations, it may happen, that only one, or some of them may be made perfect by a separate answer; and strictly we ought to stipulate for every thing severally, and to answer severally.

XVIII. No man can stipulate for another, as we have already observed; for stipulations and obligations have been invented, that every person may acquire for himself whatever may be of

advantage to him; and, if this is given to another, the stipulator has no interest. But, if a man would effectually contract for another, he should stipulate, that unless the covenants of his stipulation are performed, the obligor should be subject to a penalty, payable to him, who otherwise would receive no advantage from the obligation: for, when a penalty is stipulated, the advantage or interest of the stipulator is not regarded, but the quantity of the penalty is the only thing considered. And therefore, if a man should stipulate, that a certain thing should be given to Titius, it will not avail; but, if to the stipulation he adds a penalty, as thus, "do you promise to give me ten aurei, if you do not give the thing stipulated to Titius?" the stipulation of the penalty will take place, if the obligation is not performed.

XIX. But, if any man stipulates for the benefit of another, when he himself also receives an advantage from it, the stipulation is valid. Thus if he, who hath begun to administer the tutelage of a pupil, should afterwards cede or give up the administration to his co-tutor, and stipulate for the security of the estate of his pupil, in this case, (inasmuch as such a stipulation is for the interest of the stipulator, who would be obliged to answer all damages to the pupil, if the co-tutor did not justly administer the pupillary trust,) the obligation would bind. And upon the same principle, if a man stipulates, that a thing shall be given to his proctor or attorney, the stipulation shall prevail. And a stipulation is also good, which is made by a debtor for the use of his creditor, because it is the interest of the debtor, either that the penalty, upon which he borrowed money of his creditor, should not be exacted from him, or that his goods, which are hypothecated with his creditor, should not be sold.

XX. On the contrary, he who promises, that another, namely Titius, shall perform some particular act, is not bound by such promise, unless he makes himself subject to a penalty, if the act is not performed by Titius.

XXI. No man can legally stipulate, that a thing shall be given him, when it shall become his own.

XXII. If the stipulator stipulates in regard to one thing, and the obligor promises in relation to another, no obligation is contracted; and the parties are as much at liberty, as if no answer had been made to the interrogation: and this would be the case, if a man should stipulate, that Stichus should be given to him, and the obligor should intend to give Pamphilus, upon a thorough persuasion, that Pamphilus is called Stichus.

XXIII. A promise made for a dishonest purpose, as, for example, to commit homicide or sacrilege, is not binding.

XXIV. If a stipulation hath been entered into upon condition, and the stipulator should die pending the event of it, his heir will be entitled to an action against the obligor, if the event afterwards happens. And, if the obligor should die before the condition happens, his heir may be sued by the *stipulator*.

XXV. Whoever stipulates, that a thing shall be given to him this year or this month, cannot legally sue the obligor, till the whole year or month is elapsed. And, if a man stipulates, that a piece of ground, or slave, shall be given to him, he cannot instantly sue the obligor, but must wait, till such a space of time hath past, in which a delivery might reasonably have been made.

TITLE XXI.

Of Sureties.

IT frequently happens, that others bind themselves for him who promises. These bondsmen or sureties are called *fide-jussors*, and are generally required by creditors for their greater security.

Where required.

I. *Fide-jussors* may be received in all obligations, whether contracted by the delivery of the thing itself, by words, by writing, or the mere consent of parties: nor is it material, whether the obligation is civil or natural; for a man may intervene, and oblige himself, as a *fide-jussor* or surety, even on the behalf of a slave; and this may be done, whether the person who accepts the *fide-jussor* is a stranger or the master of the slave, when the thing due is a natural debt or obligation.

Of the Heir.

II. A *fide-jussor* is not only bound himself, but by his death transmits the obligation to his heir.

III. A *fide-jussor* may be accepted either before or after an obligation is entered into.

Where there are more Fide-Jussors.

IV. Where there are *fide-jussors* or sureties, let them be ever so numerous, they are each bound by law *in solidum*, i. e. for the whole debt; and the creditor is at liberty to chuse from whom he will demand it. But, by a rescript of the emperor *Adrian*, a creditor may be obliged to demand separately from every *fide-jussor*, who is solvent at the time of contestation of suit, his share of the debt *pro rata*; and, if any of the *fide-jussors*, at the time of

the contestation of the suit, is not solvent, the burden falls upon the rest. But, if a creditor obtains his whole demand from one of the *fide-jussors*, the whole loss shall be his, if the party principal, for whom he was bound, is insolvent: for such *fide-jussor* can impute this loss only to himself, since he might have called to his aid the rescript of the emperor *Adrian*, and have prayed, that an action should not have been given against him, obliging him to the payment of more than his share of the debt, as a surety.

The Duty of the Fide-Jussor.

V. *Fide-jussors* ought not to be bound in a greater sum than the debtor owes, for whom they are bound; for their obligation is an accession to the principal obligation; and an accessary debt cannot be greater than the principal, though it may be less. Therefore, if the principal obligor promises ten *aurei*, the *fide-jussor* may be bound in five; but the *fide-jussor* cannot be bound in *ten rurei*, when the principal obligor is bound in only five. Also, when the obligor promises simply, the surety may promise conditionally; but, if the surety is bound simply, when the principal debtor is bound only conditionally, the obligation is void. And the terms *greater* and *less* take place not only in quantity but also in time; for an obligation to give or deliver a thing instantly is greater, than an obligation to give or deliver it after a time.

Of the Action of a Fide-Jussor.

VI. If a *fide-jussor* hath been obliged to pay money for the person for whom he was bound, the *fide-jussor* may have an action of mandate against him for the recovery of the sum paid.

VII. A *fide-jussor* may thus bind himself even in greek; τη ἐμη πιστει κελευω, λεγο, that is, *I answer or speak solemnly upon my faith.* But, if a man should use the words θελο or βουλομαι, I am willing, or φημι, I promise, any of these would serve the same purpose, as κελευω or λεγο.

VIII. We must here observe, that it is a general rule in all fide-jussorial stipulations, that whatever is alleged in writing to have been done, is to be presumed to have been actually done: and therefore, if a man in writing confesses, that he hath made himself a *fide-jussor*, it is also presumed, that all the necessary forms were observed.

TITLE XXII.

Of Written Obligations.

A species of written obligation anciently prevailed, which was effected by registering the names of the contractors; but these contracts, which were called *nomina*, are not now in use. But, if a man confesses in writing, that he owes, what in reality he never received, he cannot, when an action is brought against him for this confessed debt, oppose an exception to it, setting forth, *that the money was never paid*; if much time has elapsed after the date of the obligation, and the limitation of this time has frequently been prescribed by the constitutions. Hence it is, at this day, that a man must be bound by his written note, if he cannot legally bring an exception; and from this written contract arises an action called a *condiction*, when no stipulation or verbal obligation can be proved. And formerly the imperial constitutions gave a large space of time, not less than five years, in which any man was allowed to bring an exception, *pecuniæ non numeratæ*, i. e. an exception of money not paid. But we, for the safety of creditors in general, have greatly contracted this allowance of time, by our imperial constitution, which ordains, that an exception shall not be brought after the expiration of two years.

TITLE XXIII.

Of Obligations by Consent.

OBLIGATIONS are made by consent in *buying*, *selling*, *letting*, *hiring*, *societies* or *partnerships*, and *mandates*. And an obligation, entered into by any of those means, is said to be contracted by consent; because neither writing nor the presence of parties is absolutely requisite. Neither is it necessary, that any thing should be given or delivered, to the intent, that the obligation should take effect; for it suffices, that the contractors consent; and, for this reason, these contracts may be entered into by absent parties, either by letters or messengers. And note also, that, in these contracts by consent, the parties are bound to each other mutually to do what is just and right; but in verbal obligations one party stipulates and the other promises.

TITLE XXIV.

Of Buying and Selling.

THE contract of buying and selling is made perfect, as soon as the price of the thing to be sold is agreed upon, although it is not

paid; nor even an earnest of it given; for whatever is taken as earnest, does not constitute a contract, but serves only for a proof of it. And this is the law in regard to those bargains and sales, which are not in writing; for in such we have made no innovation. But, where there is a written contract, we have ordained, that a bargain and sale shall not become absolute, unless the instruments of sale are written by the contracting parties, or at least signed by them, if written by others. And, when the instruments of sale are drawn by a public notary, the contract is not binding, if any formality hath been omitted, or if the instruments are not complete in all their parts; for, if any thing is omitted, either the buyer or seller may recede from his agreement without penalty, if nothing has been given in the name of earnest. But, if earnest has once been given, then the buyer, whether the contract was written or unwritten, if he refuses to fulfill it, loses his earnest, and the seller, if he refuses, is compellable to restore double the value of the earnest, although no agreement of this kind was expressly made. But it is always necessary, that the price of the thing to be sold should be fixed; for, till then, there can be no *emptio-venditio*, i. e. buying and selling.

Of a certain or uncertain Price.

I. The price, as we have before observed, ought to be certain. And formerly, when it was covenanted, that a thing should be sold, *at whatever price* Titius *should value it*, the ancient lawyers much doubted, whether such a sale was good, or not good. But we have ordained by our decision, that as often as it is agreed, that a thing shall be sold, at a price to be fixed by a third person, such contract shall be valid under that condition; so that, if the nominee, or arbitrator, determines the price, it ought instantly to be paid according to the determination, and the thing sold ought to be delivered, and the sale perfected; for otherwise the buyer may have an action *ex empto*, i. e. on account of the thing bought; and the seller may have an action *ex vendito*, i. e. on account of the thing sold. But, if the arbitrator either refuses, or is unable to determine the price, the sale is null. And, as it hath been our pleasure, that this shall be the law in relation to sales, it is but right, that the same law should prevail, in locations and conductions, i. e. in letting and hireing.

Difference of Buying and Exchange.

II. The price of any thing bought should consist of cash or money told; for it hath been much doubted, whether the price of goods can be said to be paid, if any other thing is given for them than money; as, for instance, whether a slave, a piece of

ground, or a robe, can be paid, as the price of a thing. The lawyers *Sabinus* and *Cassius* thought, that a price might consist of any thing, and from hence it has been commonly said, that *emptio-venditio*, or buying and selling, is contracted by commutation, and that this species of buying and selling is the most ancient. The advocates for this side of the question quote *Homer*, who relates in the following lines, that a part of the Grecian army bought wine by giving other things in exchange for it.

> Wine the rest purchas'd at their proper cost,
> And well the plenteous freight supplied the host:
> Each in exchange proportion'd treasures gave,
> Some brass or iron, some an ox or slave. *Pope.*

But the lawyers of another sect maintained the contrary, and declared, that commutation was one thing, and *emptio-venditio* another; for otherwise said they, in the commutation of any two things it can never appear, which has been sold, and which has been given, as the price of the thing sold; and it is contrary to reason, that each should appear to have been sold, and that each also should appear to have been given, as the price of the other. And the opinion of Proculus, who maintained, that commutation is a species of contract, separate from vendition, hath deservedly prevailed: for he is supported by other verses from Homer, and has inforced his opinion with the strongest arguments; and this is the doctrine, which our predecessors, the emperors Dioclesian and Maximian, have admitted, as it appears more at large in our digests.

Of the Risque of the Thing sold.

III. When emption and vendition are once contracted, (and this, as we have observed, is effected, as soon as the price is agreed upon, when there is no covenant in writing,) then the buyer is liable to the risque of the loss of the thing sold, or of the damage, which may happen to it, although it hath not been delivered to him. And therefore, if a slave, thus sold, should die, or receive any hurt, or if a building, or part of it, should be consumed by fire, or if the lands sold, or any portion of them should be washed away by a torrent, or be made worse by an inundation, or a storm, which may destroy the trees, the loss in all these cases must be sustained by the buyer, who is obliged to pay the price agreed upon, although he never had possession of the thing; for whatever the accident is, if it happens neither by the fraud, nor the fault of the seller, he his secure. But on the other hand, if, after the sale, any accession is made to the lands by alluvion or otherwise, this increase becomes the gain of the buyer; for it is

just, that he should receive the profit, who must have sustained the loss. But, if a slave, who is sold, either runs away or is stolen, and neither fraud nor negligence can be imputed to the seller, it must be inquired, whether the seller undertook the safe custody of the slave, till delivery should be made; if he did, he is answerable for the accident; if he did not, he is secure. The same law takes place in regard to all other animals and things. But when these accidents happen, and the buyer is to sustain the loss, the seller is obliged to make over his right of vindication and condiction; that is, he must transfer to the buyer all right of action, whether real or personal, if necessary; for he who has not delivered the thing sold, is still considered as the proprietor of it. Actions also of theft, or damage done, must be transferred by the seller to the buyer, when the thing sold is stolen, or damaged, before delivery.

Of Conditional Buying.

IV. A sale may be contracted conditionally, as well as purely: for instance, when the person, who is inclined to sell, speaks thus; if within a certain time you shall approve of the slave Stichus, he shall be yours for so many aurei.

Of the Buying of a thing not in Commerce.

V. Whoever knowingly purchases a place sacred, or religious, or a public place, such as a forum or court of justice, he makes a void purchase. But, if a man should purchase any of the before-mentioned places, having taken them for profane or private, being imposed upon by the seller, then such purchaser, not being able to enjoy the possession of what he has bought, may have an action *ex empto* against the seller, and recover the damage suffered by the deceit. The same law also obtains, if any person, through error, should buy a freeman instead of a slave.

TITLE XXV.

Of Letting and Hiring.

LOCATION and conduction, i. e. letting and hiring, are nearly allied to emption and vendition, i. e. to buying and selling; and are governed by the same rules; for as emption and vendition are contracted as soon as the price of the thing is agreed upon, so location and conduction are contracted when the hire is once fixed by the parties. The locator, or person who lets, is entitled to an action, called *actio locati*, if he is aggrieved by the conductor or hirer; and the conductor may have an action called *actio conducti*, against the locator.

I. We are willing, that what we have before observed in regard to the sale of a thing, when the price is referred to a third

person, should also be understood to have been said of location and conduction, when the quantity of the hire is not agreed upon between the parties, but left to arbitration. And therefore, if a man sends his cloaths to a fuller to be scoured, or to a taylor to be mended, and does not previously agree upon any price, in this case location and conduction are not understood to be properly contracted; but an action may be brought by either party, *præscriptis verbis*, i. e. in words prescribed and adapted to the circumstances of the case.

In what Location and Conduction exist.

II. As it was formerly a question, whether emption and vendition could be contracted by an exchange of things, so it hath also been doubted, whether location and conduction can be said to exist, when one man lends another a particular thing for his use, and receives in return some other thing, of which he is also permitted to have the use; and it has been determined, that this exchange does not constitute location and conduction, but is a distinct species of contract: for example, if two neighbours have each of them an ox, and each agrees to lend his ox to the other alternately for ten days, to do the labours of the field, and the ox of the one dies in the possession of the other, in this case, he, who has lost his ox, can neither bring the action *locati* nor *conducti*, nor even the action *commodati*; for the ox was not lent gratuitously; but he may sue by virtue of an action called *præscriptis verbis*; i. e. by an action upon the case.

Of Emphyteusis.

III. The contract of buying and selling, and that of letting and hiring, are so nearly connected, that, in some cases, it has been difficult to distinguish the one from the other; as when lands have been demised to be enjoyed for ever, upon condition, that, if a certain yearly pension, or rent, is constantly paid to the proprietor, it shall not be in his power to take these lands from the tenant or his heirs, or from any other person, to whom such tenant or his heirs shall have sold them, given them gratuitously, or as a marriage portion, or otherwise disposed of them. But, when this contract, concerning which the ancient lawyers had great doubts, was by some thought to be an emption and vendition, and by others a location and conduction, the Zenonian law was enacted, which settled the proper nature of an emphyteusis, making it to be neither the one nor the other of the beforementioned contracts, but declaring it to be supported by its own peculiar covenants, and ordaining, that whatever is agreed upon by the parties shall obtain and take place, as a contract; and

when there is no covenant, which declares upon whom the loss of the lands shall fall, that then, if the whole estate happens to be destroyed by a torrent, an earthquake, or any other means, the proprietor must be the sufferer: but, if a part only is destroyed, that the loss shall then be borne by the tenant; and this is the law in use.

IV. Also, if Titius, for example, should agree with a goldsmith to make a certain number of rings, of a particular size and weight, and to furnish the gold, for which Titius should promise him ten aurei, as the value both of the workmanship and the gold, it hath been a question, whether such a contract would be a buying and selling, or a letting and hiring. Cassius was of opinion, that it would be a buying and selling in regard to the matter, and a letting and hiring in regard to the work; but it is now settled, that, in this case, an emption and vendition would only be contracted. But, on the other hand, it is not to be doubted, that, if Titius should give his own gold, and agree to pay only for the workmanship, this contract would be a location and conduction.

Of the Obligations of the Hirer.

V. The conductor, or hirer, is not only obliged to observe strictly the covenants of the conduction, but is also bound in equity to perform whatever hath been omitted to be inserted. And whoever has given or promised hire for the use of cloaths, silver, horses, &c. is bound to take the same care of them as the most diligent master of a family would take of his own property. But, if the hirer does this, and yet loses the things hired by some fortuitous event, he shall not be answerable for the loss.

Of the Death of the Hirer.

VI. If the conductor, or hirer, dies before the time of the conduction is expired, his heir succeeds to his right, and is intitled to the thing hired, for the remainder of the term.

TITLE XXVI.

Of Partnership.

Division of the Subject Matter.

IT is common for persons to enter either into a general partnership or society of all their goods, and this the greeks emphatically call, κοινωνιαν, i. e. communion; or into a particular partnership, which regards only some single species of commerce, as that of buying and selling slaves, oil, wine, or corn.

Of the Shares of Loss and Gain.

I. If no express agreement has been made by the partners concerning their shares of profit and loss; the loss must be equally borne, and the profit must be equally divided. But, if any particular agreement has been made, it must be observed; for it was never yet doubted, but that the covenant would be binding, if two persons should agree, that two shares of the profit and loss should belong to one partner, and that only the third part of both should belong to the other.

Of unequal Shares.

II. But it has been questioned, if *Titius* and *Seius* should covenant between themselves, that Titius should receive two parts of the profit and bear but a third of the loss, and that Seius should bear two parts of the loss, and receive but a third share of the profit, whether such an agreement would be binding? Quintus Mutius was of opinion, that such a covenant was contrary to the nature of partnership, and ought not therefore to be ratified; but Servius Sulpicius, whose opinion hath prevailed, thought otherwise, and for this reason; because the labour of some is so highly valuable, that it is but just, that they should be admitted into society upon the most advantageous conditions, for no man doubts, but that partnership may be entered into by two persons, when one of them only finds money, inasmuch as it often happens, that the work, and labour of the other, amounts to the value of it, and supplies its place. And also, contrary to the opinion of Mutius, it hath obtained as law, that a partner may by agreement take a share of the profit, and not be accountable for any part of the loss; for Servius thought, that this likewise might be done equitably: but it must be so understood, that, if profit accrues from one species of things and loss from another, only what remains, after the loss is compensated, shall be looked upon as profit.

Of Shares expressed.

III. It is also a settled point, that, if partners expressly mention their shares in one respect only, either solely in regard to gain, or solely in regard to loss, their shares of that, which is omitted, shall be the same as of that, which is mentioned.

How Partnership is dissolved.—Renunciation

IV. A partnership lasts as long as the partners persevere in their consent to continue such; and, if one of them renounces the partnership, the society is dissolved. But, if a man renounces with a fraudulent intent, and for no other end, but that he may

enjoy the sole benefit of some future fortune, which he expects, his renunciation will not avail: for, if a partner in common, as soon as he finds, that he has been appointed an heir, should renounce his partnership, that he may possess the inheritance exclusive of all others, he would nevertheless be compelled to divide the inheritance equally with his former partners; yet, if an inheritance, which he did not expect, should by accident fall to him after renunciation, the whole would be his own: but those, from whom a partner hath separated himself by renouncing, possess solely for themselves whatever they acquire, after the renunciation of that partner.

Of Death.

V. A partnership is also dissolved by the death of one of the partners: for he, who enters into partnership always chuses some certain known person to be his partner, upon whom he can depend. And, although a partnership is entered into by the consent of many, it is nevertheless dissolved by the death of one, although the rest survive; and this is the law, unless special covenants are made to the contrary at the time of forming the society.

The Termination of the Object.

VI. Also, if a partnership is entered into on account of some particular commerce, and an end is put to that commerce, the partnership is of course ended.

Of Confiscation.

VII. It is likewise manifest, that a partnership is dissolved by confiscation; to wit, if all the goods of a partner are confiscated; for when another (for example, the treasurer of the exchequer), succeeds in his place, he is reputed as civilly dead.

Of the Cession of Goods.

VIII. Also, if a man in partnership, being pressed by his debts, makes a cession or a surrender of his goods, and they are sold to satisfy either public or private demands, the partnership is dissolved. But, if the rest of the copartners should still desire to be in society either with or without this man, the first partnership would not continue, but a new one would commence.

Of Fraud and Negligence.

IX. It has been a question, whether a partner, like a depositary, is accountable for fraud only, or whether he is also accountable for his negligence? And it now prevails, that he is answerable for all the damages, which happen through his fault. And, if a man fails in having used the most exact diligence, such a failure is not comprehended under the term *culpa*, or fault: for a partner

is not liable to answer damages, if, in regard to the goods of the community, it appears, that he has used the same care and diligence towards them, which he has usually observed in keeping his own private property. And it is certain, that whoever chuses a negligent man for his partner, can lay the blame upon himself only and impute his misfortune to his own ill choice.

TITLE XXVII.

Of Mandate.

A mandate is framed five ways; either when it is given solely for the benefit of the mandator; or partly for his benefit, and partly for that of the mandatary; or solely for the service of some third person; or partly for the profit of the mandator and partly for the service of a third person; or for the benefit of the mandator, and partly for the use of a third person. But, if a mandate is given solely for the sake of the mandatary, the mandate is useless: for no obligation can arise from it, nor of course any action.

When a Mandate is for the benefit of the Mandator.

I. A mandate is given solely for the benefit of the mandator, when he requires the mandatary to transact his business, to buy lands, or to become a surety for him.

Of the Mandatary.

II. A mandate is given partly for the benefit of the mandator, and partly for the benefit of the mandatary, if the mandator requires you to lend money upon interest to Titius, who would borrow it for the use of the mandator; or if, when you are upon the point of suing a man on account of a fide-jussory caution, or a suretyship, he should authorise you at his own risque to sue the principal debtor; or if he should impower you at his own hazard to stipulate for the sum, which he owes you, from some other person, whom he appoints.

A Mandate for the Use of a third Person.

III. A mandate is interposed only for the sake of a third person, when the mandator requires the mandatary to perform some office for Titius, to buy lands for him, or to become his bail.

For the Use of the Mandatary and Another.

IV. A mandate tends to the benefit of the mandator, and also of a third person, when the mandator requires you, who are the mandatary, to transact some affair for the common benefit of both him and Titius, or to buy lands for them both, or to be bound for them.

Of the Mandatary and Another.

V. A mandate is given in favour of the mandatary and of a third person, when the mandator requires you to lend money to Titius, upon interest; but if you are required to lend money without interest, the mandate can only be in favour of him, to whom it is lent.

VI. A mandate is given solely for your own benefit, if the mandator requires you rather to make a purchase of lands than to lend your money upon interest; or, on the contrary, rather to lend your money upon interest than to buy lands. But a mandate of this species seems rather to be good advice than a mandate; and is therefore not obligatory; for an action of mandate cannot be brought against a man on account of the advice which he has given, although it has not proved beneficial to him to whom it was given; inasmuch as every one is at full liberty to consult his own reason, whether the counsel given to him is expedient or not. And therefore, if you should be obliged to employ your money, which now lies dead, either by lending it out at interest, or in making a purchase, and you shall become a loser by following this advice, the adviser would not be liable to an action. And this is so true, that it has even been a question, whether an action of mandate will lie against him who hath required you by mandate to lend money to Titius, who is insolvent. But the opinion of Sabinus hath obtained, and a mandate in this case is now judged to be obligatory; for you would never have trusted Titius but in obedience to the mandate.

VII. A mandate contrary to good manners is not obligatory: as if Titius should command Sempronius to commit theft, or to do some act to the damage or injury of a third person; for, although Sempronius should suffer a penalty or punishment in consequence of his obedience to such a mandate, he will not be intitled to any action against Titius.

Of the Execution of a Mandate.

VIII. He who executes a mandate ought not to exceed the bounds of it; for example, if a mandator should require you to purchase lands, or to be bound for Titius, to the amount of an hundred aurei, you ought not to buy the lands at an higher price, or be bound for Titius in a greater sum: for, if you exceed the mandate, you will not be intitled to an action for the recovery of the excess. And Cassius and Sabinus were even of opinion, that, although you were willing to bring an action of mandate for no more than the hundred aurei, you could not recover them. But it was held by the lawyers of a different school, that the manda-

tary might sue the mandator for the hundred aurei: and this appears to be the more equitable opinion. But, if you buy certain lands at a less price than that which the mandator has allowed, you will undoubtedly be intitled to an action of mandate: for if he hath ordered that an hundred aurei shall be expended in the purchase of a particular estate, he will certainly be understood to have ordered, that the same estate should, if possible, be purchased at a less price,

Of the Revocation of a Mandate.

IX. A mandate, properly contracted, becomes null, if it is revoked whilst intire; that is, before any act hath been done in consequence of it.

Of Death.

X A mandate also becomes null, if either the mandator or the mandatary dies whilst it continues intire. But it is allowed, for the benefit of society, that, if a mandator dies, and the mandatary, not knowing of his death, should afterwards execute the mandate, he may bring his action against the heirs of the mandator: for otherwise an unblameable and undoubted want of knowledge would be prejudicial; and, in a similar case, it hath been determined, that, if the debtors of Titius, whose steward has been manumitted, should, without knowledge of the manumission, pay this freed-man what was due to Titius, they would be cleared from their debt, and the payment would be good; although, by the rigour of the law, it would be otherwise; since they had made their payment to another than him, to whom it ought to have been made.

Of Renunciation.

XI. Every man is at liberty to refuse a mandate; but, if it is once accepted, it must be performed, or renounced, as soon as possible, that the mandator may transact the business himself, or by another. But, if the renunciation is made so late, that the mandator can have no opportunity of transacting this business properly, an action will lie against the mandatary, unless he can shew some just cause for his delay in not making a timely renunciation.

Of Time certain and Condition.

XII. A mandate may be contracted to transact a particular business at a distant day, or upon condition.

Of Hire.

XIII. In fine, it must be observed, that if a mandate is not gratuitous, it then becomes another species of contract: for if a price is agreed upon, the contract of location and conduction com-

mences; and, in general, when a trust, or business, is undertaken without hire, the contract regards either a mandate or a deposit; but, when there is an agreement for hire, it constitutes location and conduction. And therefore, if a man gives his cloaths to a fuller, that they may be cleaned, or to a taylor, that they may be mended, and there is no agreement or promise made, an action of mandate will lie.

TITLE XXVIII.

Of Obligations from implied (quasi) Contracts.

HAVING already enumerated the various kinds of direct obligations, we will now treat of those which cannot be said properly to arise from a contract, but yet, inasmuch as they take not their origin from any thing criminal, seem to arise from an implied, or a quasi-contract.

Of Agency.

I. When one person transacts the business of another, who is absent, they reciprocally obtain a right to certain actions, called actiones negotiorum gestorum; *i. e.* actions on account of business done; and it is manifest, that these can arise from no proper or regular contract; for they take place only when one man assumes the care or affairs of another without a mandate; and, in this case, those persons for whom business is transacted are always bound without their knowledge; and this is permitted for the public good, because the business of those who are absent in a foreign country, and have not committed the administration of their affairs to any particular person, would otherwise be totally neglected: for no man would take this care upon himself, if he could not afterwards bring an action to recover what he had expended. But, as the principal is bound to reimburse the agent, who has negotiated his affairs properly, so is the agent bound to render a just account of his administration to his principal. And an a agent, in this case, is obliged to use the most exact diligence; for it will not suffice, although he proves, that he has taken the same care of the affairs of his principal, which he usually took of his own, if it can by any means appear that a more diligent man could have acted with greater advantage to his principal.

Of Tutelage.

II. A tutor, although he is subject to an action of tutelage, is not reckoned to be bound by any pact or agreement; for between a pupil and his tutor there is no express contract. But, because tutors are not subject to an action of male-feasance, they are understood to be bound by an implied, or quasi-contract; and thus both tutor and pupil may bring actions reciprocally; the pupil

may bring a direct action of tutelage against his tutor, and the tutor, if he has expended his own money in the affairs of his pupil, or has been bound for him, or has mortgaged his own possessions to the creditors, is intitled to the action called contraria tutelæ.

Of the Community of a Thing.

III. When a thing happens to be in common among persons who have never entered into a voluntary partnership; as when the same field, or part of an inheritance, is devised or given generally between two; in this case the one may be called to answer the other by the action *communi dividundo*, either because the one hath taken to his use the whole product of the ground; or because the other hath been at the sole expence of maintaining it in good order. But neither of these persons can properly be said to be bound by contract; since they made no agreement between themselves; but, inasmuch as they are exempt from any criminal action, they are accounted as bound by a *quasi*-contract.

Of Community in a Hereditament.

IV. And the same law prevails in regard to him, who is bound to his co-heir and is liable to the action *familæ erciscundæ*, for the partition of an universal inheritance.

V. An heir for the same reason cannot properly be said to be bound by contract to a legatary; for the legatary can never be supposed to have entered into any compact either with the heir, or with the deceased: but, as the heir cannot be prosecuted by an action of male-feasance, he is presumed to be indebted to the legatary by a quasi-contract.

Of a mistaken Payment.

VI. He, to whom another has paid by mistake what was not due, appears to be indebted by quasi-contract; for he is certainly not bound by an express agreement: and, strictly speaking, he might rather be said, (as we have observed,) to be bound by the dissolution than by the making of a contract: for he, who paid the money with an intent to discharge his debts, seemed rather inclined to dissolve an engagement, than to contract one. But nevertheless, whoever receives money by the mistake of another, is as much bound to repay it, as if it had been lent to him; and he is therefore liable to an action of condiction.

Where an undue Debt (when paid) cannot be redemanded.

VII. In some cases money paid by mistake, when not due, cannot afterwards be demanded: for the antient lawyers have delivered it as a maxim, that where an action for double value of

the debt is given upon the denial of it, (as by the law Aquilia, and in the case of legacies) the debtor, who has through error paid money to him, to whom it was not due, shall never recover it. But these lawyers would have this rule to take place only in regard to fixed and certain legacies, devised *per damnationem.* But our imperial constitution, which reduced all legacies and trusts to one common nature, hath caused this augmentation in *duplum* after denial to be extended to legacies and trusts in general: yet the privilege of not refunding what is paid by mistake is by our constitution only granted to churches and other holy places, which are honoured on account of religion and piety.

TITLE XXIX.

By what Persons Obligation is acquired.

Of Those who are under Power of Another.

HAVING explained the various kinds of obligations, which arise from contracts or quasi-contracts, we must now observe, that we acquire obligations not only by means of ourselves, but also by those, who are under our power; as by our slaves, and our children: and whatever is acquired by our slaves is wholly our own; but that, which is acquired by our children, under our power, by virtue of their contracts, must be divided according to the decree of our constitution, which gives to the father the usufruct of the thing gained, but reserves the property of it to the son. But a father, in bringing an action, must act in obedience to our novel constitution.

I. We may also acquire things by means of freemen, and the slaves of others, whom we possess *bona fide:* but this we can only do in two cases; to wit, when they have gained an acquisition by their labour, or by virtue of something, which belongs to us.

II. We may always acquire in either of the above named cases, by means even of those slaves, of whom we have only the usufruct or use.

III. It is certain, that a slave, who is in common between two or more, acquires for his masters, in proportion to the property, which each of them has in him; unless he stipulates, or receives something, in the name of one of them only; as if he had thus stipulated; "do you promise to give such a particular thing to Titius, my master?" for although it was a doubt in times past, whether a slave, when commanded, could stipulate for the sole benefit of one of his masters; yet, since our decision, it has become a settled point, (as we said before,) that a slave, in this case, can acquire for him only, who hath ordered the stipulation.

TITLE XXX.

How Obligations are dissolved.

By Payment.

AN obligation is dissolved by the payment of what is due; or by the payment of one thing for another, if the creditor consents: neither is it material, by whom payment is made, whether by the debtor himself, or by another for him; for a debtor becomes free from his debt, when another has paid it, either with or without his knowledge, or even against his consent. Also when a principal debtor pays his creditors, then those, who have been bound for him, are free from their obligation: and, on the contrary, when a *fide-jussor* or bondsman clears himself from his obligation by payment, he not only becomes free himself, but the principal debtor is also cleared from his debt.

By Acceptilation.

I. An obligation is also dissolved by acceptilation; which is an imaginary payment: for, if Titius is willing to remit what is due to him by a verbal contract, it may be done, if the debtor says; do you regard what I promised you, as accepted and received? and Titius answers, I do. An acceptilation may also be made in Greek, if it is so worded, as to agree with the Latin form; *εχεις λαβων δηναρια τοσα; εχω λαβων.* But the obligations, which are thus dissolved, are verbal contracts, and no other: and it seems to be a just consequence, that an obligation, made by words only, may be dissolved by other words of a contrary import. But it is observable, that any species of contract may be deduced to a stipulation, and of course may be dissolved by acceptilation. And note, that as a debt may be paid in part by money, so may it be paid in part also by acceptilation.

Of the Aquilian Stipulation.

II. There is another species of stipulation, called commonly the Aquilian stipulation, by virtue of which every other kind of obligation may be reduced to a stipulation, and may afterwards be dissolved by acceptilation. For the Aquilian stipulation changes all obligations, and was constituted by Gallus Aquilius in the following manner. Do you promise, said Aulus Agerius to Numerius Nigidius, to pay me a sum of money, in lieu of what you was, or shall be, obliged to give me or to perform for my benefit, either simply, at a day to come, or upon condition; and in lieu of those things, which, being my property, you have, detain, or possess; or of which you have fraudulently quitted the possession; and for which I may, or shall be, entitled to any species of action,

plaint, or prosecution; Numerius Nigidius answered I do: and, when this was said, Numerius Nigidius asked Aulus Agerius, if he regarded the money as accepted and received, which he (Numerius) had promised? to which Aulus Agerius answered, that he did regard it as accepted and received.

Of Novation.

III. An obligation is also dissolved by novation; as when you stipulate with Titius to receive from him what is due to you from Seius. For, by the intervention of a new debtor, a fresh obligation arises, by which the prior obligation is discharged, and transferred to the latter. And sometimes, although the latter stipulation is of no force, yet the prior contract is discharged by the mere act of novation: as if Titius should stipulate to receive a debt, which I owe him, from a pupil without the authority of his tutor; for in this case the debt is lost, because the first debtor is freed from his debt, and the second obligation is null: but it is not the same, if a man stipulates from a slave, with a design to make a novation: for then the first debtor remains bound, as if there had been no second stipulation. And, if you stipulate from the same person a second time, a novation arises, if any thing new is covenanted in the latter stipulation, as when a condition, a day, or a bondsman is added, or taken away. But note, that, when a condition only is added, novation does not take place, till the event happens; and, till then, the prior obligation continues. It was observed as a rule among the ancient lawyers, that a novation arose, when a second contract was entered into with an intent to dissolve the former; but it was always a matter of great difficulty to know with what intent the second obligation was made; and the judges, having no positive proof before them, were forced to form their opinions upon presumptions, and according to the circumstances of every particular case. This incertainty of judging gave rise to our constitution, which enacts, that a novation of a former contract shall only take place, when it is expressed by the contractors, that they covenanted with an intent to make a novation; and that, when this is not expressed the prior contract shall continue valid; and the second be regarded as an accessson to it: so that an obligation may remain by virtue of both contracts, according to the determination of our before named constitution, which may be better known by perusal.

By Dissent.

IV. We must observe farther, that those obligations, which are contracted by consent, may be dissolved by dissent. For, if Titius and Seius have agreed by compact between themselves,

that Seius shall have a certain estate for an hundred aurei, and afterwards before execution, that is, before the price is paid, or livery is made of the lands, if the parties dissent from their agreement, they are mutually discharged from it. And the same may be said of location and conduction, and of all other contracts which arise from consent.

END OF THE THIRD BOOK.

THE

INSTITUTIONS

OR

ELEMENTS OF JUSTINIAN.

Book the Fourth.

TITLE I.

Of Obligations which arise from Crime.

HAVING explained in the preceding book the nature of obligations, which arise from contracts and quasi-contracts, it follows, that we should here treat of those, which arise from male-feasance and quasi-male-feasance. The former, as we have shewed in the proper place, are divided into four species; but the latter are of one kind only; for they all arise *ex re*, that is, from the crime or male-feasance itself; as from theft, rapine, damage, injury.

Definition of Theft.

I. Theft is a fraudulent substraction of the thing itself, the use of it, or the possession, for the sake of gain. And this is prohibited by the law of nature.

Etymology.

II The word *furtum*, theft, is derived from *furvum*; black or dark; because theft is committed privately, and generally in the night:—or from *fraus*, fraud:—or from *ferendo*, which is of the same import with *auferendo*, and denotes a subtraction, or taking away. Or perhaps *furtum* is derived from the Greek; for the Greeks call *fures*, φωρας; and φωρας is derived from φερειν, which signifies to take away.

Division.

III. Of theft there are two species, manifest and not manifest: for the thefts, called *conceptum* and *oblatum*, rather denote the species of action arising on account of theft, than the species of theft; as will appear in the next paragraph. A manifest thief, whom the Greeks call επ' αυτοφωρω, is he, who is taken in the act of thieving, or in the place, where he committed it; as if a man, having committed a theft within an house, should be apprehended before he had passed through the outward gate of it: or, having stolen grapes or olives, should be taken in the vineyard or olive orchard. Manifest theft is also farther extended: for, if the thief is apprehended, whilst he is seen to have possession of the thing stolen, or if he is taken in public or in private, by the owner or by a stranger, at any time before his arrival at the place, to which he proposed to carry it, he is guilty of a manifest theft. But if he actually arrives, before apprehension, at the place proposed, then, although the thing stolen is found upon him, he is yet not reputed in law to be a manifest thief. By this description, which we have given of manifest theft, it may be clearly understood what is meant by theft not manifest.

Of the division of Thefts into Conceptum, Oblatum, Prohibitum, and Exhibitum.

IV. A theft is called *conceptum*, i. e. found, when a thing stolen is searched for and found in the possession of some person in the presence of witnesses; and a particular action, called *actio concepti*, lies against such possessor, although he did not commit the theft. A theft is called *oblatum*, i. e. offered, when a thing stolen is offered for instance to Titius, and found upon him, it having been given to him by Seius, to the intent that it might rather be found upon Titius than upon himself: and in this case a special action, called *actio oblati*, may be brought by Titius against Seius, although Seius was not guilty of the theft. There is also an action, called *prohibiti furti*, which lies against him, who hinders another to enquire of theft in the presence of witnesses. And farther, a penalty was constituted, by the edict of the prætor, to be sued by the action *furti non exhibiti* against any man for not having exhibited things stolen, which upon a search were found to have been in his possession. But these four actions are become quite obsolete; for, since a search after things stolen is not now made according to the ancient formalities, these actions have of consequence ceased to be in use; for it is a settled point, that all, who knowingly have received and concealed a thing stolen, are subject to the penalty of theft not manifest.

Punishment.

V. The penalty of committing a manifest theft is quadruple, whether the thief is free or bond; and the penalty of committing a theft not manifest is double the value of the thing stolen.

How Theft is committed.

VI. Theft is committed not only, when one man takes the property of another for the sake of appropriating it to himself, but also in a more general sense, when one man uses the property of another against the will of the proprietor; thus, if a creditor makes use of a pledge, or a depositary of the deposit left with him, or if a man, who hath only the use of a thing for a special purpose, converts it to other uses, a theft is committed. And, if any one borrows plate under pretence of using it, at an entertainment of his friends, and then carries it with him into a foreign country,—or if a man borrows an horse, and rides it farther than he ought, theft is also committed: and the ancients have held this to be law, in regard to him, who rides a borrowed horse into a field of battle.

Of the intent of Stealing.

VII. But it hath been nevertheless been adjudged, that whoever applies a thing borrowed to other uses than those, for which he borrowed it, is not guilty of theft, for unless the borrower knew, that he so applied it, contrary to the will of the owner, who would not have permitted such application, if he had been apprized of it. But it has also been held, that the borrower in this case is not guilty of theft, if it appears, that he thought, that the owner would have given his consent. And this is a good distinction; for a theft can never be committed, unless there appears to have been a design and intention of stealing.

Of the Will of the Master.

VIII. But, if a man imagines, that he uses a thing borrowed in some manner contrary to the intention and will of the proprietor, when in reality the proprietor consents, that it should be so used, theft is not committed: and from hence arises a question upon the following case. Titius solicited the slave of Mævius to rob his master, and to bring him the things stolen; of this the slave informed his master, who, being willing to discover Titius in the fact, permitted the slave to carry certain things to Titius. as stolen; will Titius, in this case, be subject to an action of theft, or to an action for having corrupted a slave, or to neither? When this was proposed to us as a matter of doubt, and we perceived the altercations, which had formerly subsisted among the ancient lawyers upon the same point, some of them allowing of neither

of the before-named actions, and others allowing an action of theft only, we therefore, being willing to obviate all subtilities, decreed by our constitution, that not only an action of theft might be brought, but also the action *servi corrupti*, which lies for having corrupted a slave. For although the slave became not the worse for the solicitation, and therefore the causes, which introduce the action *servi corrupti*, do not concur; yet inasmuch as such solicitation was intended to corrupt, it hath therefore pleased us, that a penal action shall lie against the party soliciting in the same manner as if he had actually succeeded by corrupting the slave: and this we have ordained, lest impunity might encourage any evil-disposed persons to make the same attempt upon other slaves, who might have less strength of mind, and be more easily corrupted.

Of the objects of Theft. Of free Men.

IX. A theft may be committed even of free persons; as, for instance, when children, who are under power, are surreptitiously taken from their parents.

Of your own Property.

X. A man may also possibly commit a theft even of his own property; as when a debtor hath taken away any particular thing, which he had left in pledge with his creditor.

Of Auxiliaries in Theft.

XI. An action of theft will, in some cases, lie against persons, who did not actually commit the theft; it will lie, for example, against those, by whose aid and advice the theft was committed; and whoever strikes money out of your hand, to the intent that another may pick it up; or whoever so obstructs you, as to give an opportunity to his accomplice to take your sheep, oxen, or any part of your property, must be reckoned in the number of aiders and advisers. The ancient lawyers also included him in this number, who frightened away a herd from its pasture with a red cloth. But, if a man should do any of these acts wantonly, and without an intention of committing theft, then an action can lie only in *factum*; i. e. upon the case, or the fact done: but, when Titius commits theft by the aid of Mævius, they are both subject to an action of theft. Theft seems to be committed both by aid and advice, when a man puts a ladder to a window, or breaks open a door or window, to the intent, that another may commit theft; or when one man lends another iron bars, or ladders, knowing the bad purposes, to which they are to be applied. But it is certain, that he, who hath afforded no actual assistance, but hath only given his counsel by advising the crime, is not liable to an action of theft

XII. When persons under the power of parents or masters take any thing surreptitiously from such parents or masters, a theft is committed, and the thing is looked upon as stolen; so that it cannot be prescribed-to by any one, until it hath first reverted into the power of the proprietor; and yet an action of theft will not lie; for between parents and their children, or masters and slaves, no action can arise upon any account. But if the fact was done by the aid and advice of any other, inasmuch as a theft is committed, an action of theft will lie against the aider.

XIII. An action of theft may be brought by any man, who has an interest in the safety of the thing stolen, although he is not the proprietor of it: and the proprietor himself can have no action, unless he has an interest.

XIV. From hence it follows, that a creditor may bring an action of theft, on account of a pledge stolen, although his debtor is solvent; because it may be more expedient for him to rely upon his pledge, than to bring an action against the person of his debtor; and, although the debtor himself should have been the taker of the pledge, yet an action of theft will lie against him.

XV. If a fuller receives cloths to clean, and they are afterwards stolen from him, the fuller may bring an action of theft, but not the owner; for the owner is reputed to have no interest in their safety, because he has a right of action, called *locati*, against the fuller. But, if a thing is stolen from a *bona fide* purchaser, he is intitled, like a creditor, to an action of theft, although he is not the proprietor. But an action of theft is not maintainable by the fuller, or any tradesman in similar circumstances, unless he is solvent; that is, unless he is able to pay the owner the full value of the thing lost; for, if the fuller is insolvent, then the owner, who cannot recover from the fuller, is allowed to bring an action of theft, having in this case an interest. And note, that whoever is unable to pay the whole of what is due, such person is esteemed insolvent, let the deficiency be ever so small.

Of Things lent.

XVI. The ancients were of opinion, that what we have said of a fuller is equally applicable to him, to whom something is lent. For as the fuller, by agreeing for a certain price, is obliged to make good the cloths committed to his custody, so is he also, who receives a loan for the sake of using it, under the like necessity of preserving it. But we have amended the law in this point by our decisions, so that it is now at the will of the owner either to bring an action of theft against the thief, or an action, on account of the thing lent, against the borrower. But, if the owner once

makes an election of the one, he can never afterwards have recourse to the other; and, if he chuses to prosecute the thief, the borrower is altogether free from any action; and if the owner, or lender, brings a suit against the borrower, he can by no means bring an action against the thief. But the borrower, who is convened on account of the thing lent, may bring an action of theft against the thief, if the owner, who convened him, was apprized that the thing was stolen; but, if the owner, either not knowing or doubting of the theft, institutes an action of loan against the borrower, and afterwards upon information is willing to withdraw it, and recur to an action of theft, he shall have liberty, in consideration of his incertainty, to prosecute the thief without obstacle, if the borrower has not satisfied his demand; but, if the borrower has given the owner satisfaction, then the thief is freed from any action of theft, which can be brought by the owner: but he is nevertheless subject to the prosecution of the borrower, who hath satisfied the owner. But it is most manifest, that, if the owner of any particular thing, not knowing, that it is stolen, should at first institute an action of loan against the borrower, but should afterwards, upon better information, chuse to pursue the thief by an action of theft, the borrower is secure, whatever may be the issue of the action brought against the thief. And this obtains as law, whether the borrower is able to answer the whole, or a part only, of the value of the thing.

Of Things deposited.

XVII. A depositary is not obliged to make good the thing deposited, unless he is himself guilty of some fraud, or malefeasance; and therefore, as a depositary is not obliged to make restitution, when the deposit is stolen, and he has consequently no interest in the conservation of the deposit, he is not allowed to bring an action of theft, which in this case can only be maintained by the owner.

XVIII. It hath been a question, whether a person within puberty, who hath taken away the property of another, can be guilty of theft? And it hath been determined, that, inasmuch as theft consists in the intention of defrauding, a person within puberty may be charged with theft, if he is near the age of puberty, and can be proved to have been sensible, that what he did was criminal.

XIX. An action of theft can only be brought for the penalty, whether double or quadruple: for the owner of the thing stolen may recover the thing itself either by vindication or condiction. An action of vindication may be brought against him, who hath possession, whether he is the thief or any other; but condiction is

maintainable only against the thief himself, or his heir; yet it will lie against either of them, whether he is or is not in possession of the thing stolen.

TITLE II.

Of Theft by Force.

HE who takes the property of another by force, is liable to an action of theft; [for who can be said to take the property of another more against his will, than he who takes it by force; and it hath therefore been rightly observed, that such a thief is one of the worst kind:] but the prætor hath nevertheless introduced a peculiar action in this case, called "vi bonorum raptorum;" which, if brought within a year after the robbery, inforces the payment of the quadruple value of the thing taken; but, if it is brought after the expiration of a year, then the single value only is claimable; and this action is of such a nature, that it may be brought for any single thing, though it was of the least value imaginable, if it was taken by force. But the whole quadruple value is not exacted merely for the penalty, as in an action of manifest theft; for, in this quadruple value, the thing itself is included, so that, strictly, the penalty is only threefold; but then it is inflicted without distinguishing whether the robber was or was not taken in the actual commission of the fact. For it would be ridiculous, that a robber who uses force should be in a better condition than he, who is only guilty of a clandestine theft.

I. The action "de vi bonorum raptorum," is only maintainable when there is fraud used, as well as force; for, if a man, being ignorant of the law, and erroneously thinking any particular thing to be his own, should take it away by force from the possessor, upon a full persuasion that he, as proprietor, could justify such a proceeding, he ought to be acquitted upon this action: neither is he subject, under the before-mentioned circumstances, to an action of theft. But, lest robbers should from hence find out a way of practising their villainies with impunity, it is provided by the imperial constitutions, that no man shall be at liberty to take by force any moveable thing, or living creature, out of the possession of another, although he believes it to be his own; and that, whoever offends, by forcibly seizing his property, shall forfeit it; and that, whoever takes the property of another, imagining it to be his own, shall be obliged, not only to restore the thing itself, but also to pay the value of it as a penalty. And the emperors have thought proper that this should obtain, not only in regard to things moveable and moving, which

may be carried away, but also in regard to invasions, or forcible entries, made upon things immoveable, as lands or houses, to the intent that mankind may be deterred from committing any species of rapine.

II. In this action, it is not considered, whether the thing, taken by force, is or is not the property of the complainant; for, if he has an interest in it, the action is maintainable; and therefore, if a thing is let, lent, or pledged to Titius, or deposited with him, so that he becomes interested in the preservation of it, as he may be, even in the case of a deposit, if he hath promised to be answerable for its safe custody; or, if Titius was a bona fide professor, or entitled to the usufruct, or has any other right which gives an interest, he may bring this action, not for the recovery of the absolute property, but of that only to which his interest extends. And we may in general affirm, that the same causes which entitle a man to institute an action of theft, when any thing hath been privately stolen from him, will also entitle him to bring the action "vi bonorum raptorum," when force hath been used.

TITLE III.

Of the Aquilian Law.

THE action for injurious damage is given by the law Aquilia; which enacts, in the first chapter, that, if any man injuriously kills the slave, or four-footed beast of another, which may be reckoned in the number of his cattle, he shall be condemned to pay the owner the greatest price which the slave or beast might have been sold for, at any time within a year, computing backward from the day when the wound was given.

Of Quadrupeds to be considered as Cattle.

I. As the law does not speak of four-footed beasts in general, but of those only which may be reckoned cattle we may collect, that wild beasts and dogs do not come within the intendment of the law, which can be understood to include only those animals which feed in herds; as horses, mules, asses, sheep, oxen, goats, &c.——It hath also been determined, that swine are comprised under the term cattle, because they feed in herds; and this Homer testifies in the Odyssy, for which he is quoted by Ælius Marcian in his institutions. "You will find him taking care of the swine, which feed in herds on the Corasian rock," &c. Odys. b. 13.

Of Injury.

II. A man who kills another without having a right or authority so to do, is understood to kill him injuriously; but, when

there is a right, there can be no punishment; and therefore he is not subject to the law who kills a robber, or an assassin, if there was no other way of avoiding the danger threatened.

Of Accidents, Fraud, and Negligence.

III. Neither is he subject to the Aquilian law, who hath killed another by accident; if no fault can be found in him. But the law does not punish a man less for damage done by his fault or negligence than for damage done by fraud or design.

Of throwing Darts.

IV. But if a man, by throwing a javelin for his diversion or exercise, happens to kill a slave who is passing, we must, in this case, make a distinction: for if the slave is killed by a soldier, whilst he is exercising in a place appointed for that purpose, the soldier is guilty of no fault; but, if any other person should accidentally kill a slave by throwing a javelin, he is guilty of a fault; and even, if a soldier should kill a slave accidentally by throwing a javelin in any other place than that appointed for soldiers to exercise in, he also is guilty of a fault.

Of felling Trees.

V. If a man is lopping a tree, and happens to kill a slave who is passing, the lopper is guilty of a fault, if he worked near a public road, or in a way leading to a village, without giving a proper warning by proclamation; but if he made due proclamation, and the other did not take proper care of himself, the lopper is exempt from fault; and he is equally exempt from fault, although he did not make proclamation, if he worked apart from the high road, or in the middle of a field; for a stranger has no right of passage through such places.

Of neglecting a Cure.

VI. Also, if a physician, or chirurgeon, who has made an incision in the body of a slave, should afterwards neglect or forsake the cure, by which the death of a slave is occasioned, he is guilty of a fault.

Want of Skill in a Profession.

VII. The want of skill in a profession is also regarded as a fault; thus a physician, for instance, is culpable, and of course subject to an action, who occasions the death of a slave by an unskilful incision, or a rash administration of medicines.

Of want of Skill in Drivers.

VIII. If a mule-driver, by reason of unskilfulness, is unable to manage his mules, and a slave is run over by them, the mule-driver is in fault; and, if he wants strength to rein them in, when another man is able to do it, he is then equally culpable;

and the same may be said of a rider, who, through want either of strength or skill, is not able to manage his horse.

IX. These words of the law Aquilia, "Let him who kills a slave, or beast of another, forfeit the greatest price which either could have been sold for in that year," are to be understood in the following sense; as thus, if Titius accidentally kills a slave who was then lame, or wanted a limb or an eye, but had been within the space of a year perfect in all his parts, and very valuable, then Titius shall be obliged to pay, not what the slave was worth on the day when he was killed, but what he was worth at any time within a year preceding his death, when he was in the fullest vigour. An action, therefore, upon the law Aquilia, has always been regarded as penal; for it obliges a man to pay not only the full value of the damage done, but often much more than the full value; and, of consequence, can by no means pass against the heir of the offender: but it might legally have been transferred against the heir, if the condemnation had never exceeded the quantum of the damage.

X. It hath prevailed by construction, though not by virtue of the express words of the law, that not only the value of a slave is to be computed, as we have already mentioned; but that an estimation must be made of whatever farther damage is occasioned by his death; as if Titius, for example, should kill a slave at the time, when he was instiuted an heir, and before he had actually entered upon the heirship at the command of his master; for, in this case, the loss of the inheritance must be brought into the computation. Also if an horse, or mule is killed, by which a pair, or set, is broken, or if a slave is slain, who made one of a company of comedians, an estimation must be made not only according to the value of that slave or animal, but according to the value of those, which remain; for, if they are damaged, the diminution of their value is also taken into the account.

XI. The master of a slave, who is killed, is at liberty to sue for damages by a private action, founded upon the law Aquilia, and at the same time to prosecute the offender publicly, for a capital crime.

XII. The second chapter of the law Aquilia is not in use.

XIII. By the third chapter of this law, a remedy is given for every other kind of damage; and therefore, if a man wounds a slave, or four-footed animal, which is ranked among cattle, or which is not ranked among cattle, as a dog or wild beast, an action will lie against him by virtue of this third part of the law. A reparation may also be obtained, under this chapter, for all

damage injuriously done to animals in general, or to things inanimate; and the same chapter appoints an action for the recovery of the value of whatever is burned, spoiled, or broken; but the term *ruptum* would alone be sufficient in any of these cases; for in whatever manner a thing is damaged, or corrupted, it is understood to be ruptum, or spoiled, in some degree; so that whenever a thing is broken, burned, or even torn, bruised, spilled, or in any manner made worse, it may be said to be ruptum. It hath also been determined, that if a man intermixes any thing, with the wine or oil of another, so as to corrupt or impair its natural goodness, he is liable to an action founded upon this chapter of the law Aquilia.

XIV. It is evident, that the first part or chapter of the law subjects every man to an action, who through design or accident kills the slave or beast of another, and that the third part gives a remedy for any other damage, so occasioned. But by this third chapter the person, who did the damage, is not obliged to pay the highest price, which the thing damaged might have been sold for, at any time within the year, but only the value of it at any time within thirty days, previous to the damage.

XV. But it is not said in the third part of the law, that the highest value of the thing damaged shall be recovered by action. But, in the opinion of Sabinus, the valuation ought to be made, as if the word highest had not been admitted; for, when Aquilius, the tribune, proposed this law, the commonalty of Rome thought it sufficient to insert the word highest in the first chapter.

XVI. It has been determined, that, if a man hath, with his own hand or body, done damage to another, a direct action will lie by virtue of this law. But when damage is done by any other means, as by imprisoning a slave, or impounding the cattle of another, till they die with hunger; by driving a beast of burden so vehemently as to spoil him; by chasing a herd of cattle, till they leap down a precipice; or by persuading a slave to climb a tree, or go down into a well, by which he is killed or maimed; then the action, called *utilis*, is given, by which reparation may be obtained. And note, that, if Titius thrusts the slave of another into the water from the top of a bridge or bank, and the slave is drowned, in consequence of the fall, it is plain, that Titius occasioned this damage with his own hands, and he is therefore subject to a direct action. But if the damage received was not done by the hand or body of another, and is not corporal, so that neither a direct nor beneficial action can be brought by virtue of the Aquilian law, then in these circumstances an action upon the case, or fact,

will lie against the causer of the damage; and therefore, if any man through compassion should unchain the slave of another, and so promote his escape, a reparation may be obtained against him by an action upon the fact.

TITLE IV.

Of Injuries.

THE word *Injuria* in a general sense denotes every act, which is unjust; but, when specially used, it is of the same import with *contumelia*, which takes its derivation from *contemno*, and is in greek termed ὕβρις: sometimes it signifies a fault, called by the greeks ἀδικημα, in which acceptation it is used in the law Aquilia, when damage, injuriously given, is spoken of: at other times it signifies iniquity or injustice, which the greeks call ἀνὸιαμν and ἀδικιαν: therefore, when the prætor or judge pronounces sentence unjustly against any person, such person is said to have suffered an injury.

I. An injury may be done not only by beating and wounding, but also by convitious language, or by seizing the goods of a man, as if he were a debtor, when the person, who seized them, well knew, that nothing was due to him. It is also manifest, that an injury may be committed by writing a defamatory libel, poem, or history; or by maliciously causing another so to do; also by continually soliciting the chastity of a boy, girl, or woman of reputation; and by various other means, which are two numerous to be specified.

II. A man may receive an injury not only in his own person, but in that of his children under his power, and also in the person of his wife; for this is now the more prevalent opinion: and therefore, if an injury is done to Seius's daughter, who is married to Titius, an action may be brought not only in the name of the daughter, but in the name either of her father or her husband; but, if the husband receives an injury, the wife is not allowed to institute a suit in his defence; for it is a maxim, that wives may be defended by their husbands, but not husbands by their wives. And note, that a father-in-law may also commence a suit in the name of his son's wife, on account of an injury done to her, if her husband is under the power of his father.

III. An injury is never understood to be done to a slave; but is reputed to be done to the master, through the person of his slave: but what amounts to an injury in regard to a wife or child, does not amount to an injury, suffered through the person of a slave; and therefore to constitute an injury, by means of the per-

son of a slave, some considerable damage must be done to him, and something which openly affects his master; as if a stranger should beat the slave of another in a cruel manner: for in this case an action would lie; but, if a man should only give ill language to a slave, or strike him with his fist, the master can bring no action upon that account.

IV. If an injury is done to the common slave of many masters, the estimation of the injury received is not to be made according to their several proportions of property in the slave, but according to the quality of each master; for is it to them, to whom the injury is done.

V. If Titius has the usufruct of a slave, and Mævius the property, then any injury, which is done to that slave, is understood to be done to Mævius the proprietor.

VI. But, if an injury is done to a free person, who is in the service of Titius, Titius can bring no action of injury, but the servant must commence a suit in his own name, unless the person, who beat him, did it principally for the sake of affronting his master; and, in this case, Titius may also bring an action of injury. The same law likewise obtains, if your servant is the slave of another; for as often as he receives an injury, which was intended to affront you, you may yourself bring an action of injury.

VII. The punishment of an injury, according to the Twelve Tables, was a return of the like injury, if any limb was broken; but, if a blow only was given, or a single bone broken, then the punishment was pecuniary, which was not without effect among the ancients, who lived in great poverty. The prætors afterwards permitted the parties injured to fix their damages at a certain sum, which might serve as a guide to the judge, but not preclude him from lessening the estimate at his discretion. The species of pecuniary punishment, which was introduced by the law of the Twelve Tables, fell by degrees into desuetude, and that which the prætors gave rise to is now solely in use, and is termed honorary; for the estimation of an injury is either increased or diminished according to the degree and quality of the person injured; and this distinction of degree is not improperly observed even in regard to slaves; so that the same injury may be variously estimated, according to the state and condition of him who suffered it; at an higher rate, if he had acted as steward or agent to his master, and at a lower estimation if he was a slave of an inferior sort.

Of the Cornelian Law.

VIII. The law Cornelia speaks also of injuries, and hath intro-

duced an action, which lies, when a man alleges that he hath been struck or beaten, or that another hath forcibly entered into his house; and any man is allowed in this case to allege an house to be his own, whether it is in reality his, or whether he only hires or borrows it, or even lives in it as a guest.

Of an atrocious Injury.

IX. An injury is esteemed atrocious, sometimes from the nature of the fact, as when a man is wounded by another, or beaten with a club; sometimes from the place, as when an injury is done in a public theatre, in an open market, or in the presence of a prætor; and sometimes by reason of the rank of the person, as when a magistrate, or a senator, receives an injury from one of mean condition; or when a parent is injured by his child, or a patron by his freedman; for an injury done to a senator, or to a parent by his child, or to a patron by his freedman, must be atoned for by an heavier punishment than an injury done to a stranger, or a person of low degree. Also the part in which a wound is given may constitute an injury atrocious; as if a man should be wounded in his eye; but it makes no manner of alteration, whether such an injury is done to the father of a family, or to the son of a family: for the injury will neither be the more nor the less atrocious upon this account.

Of the Civil and Criminal Remedy.

X. In fine, it must be observed concerning every injury, that the party injured may sue the offending party, either criminally or civilly. If the party injured sues civilly, the damage occasioned by the injury must be estimated, and the penalty injoined accordingly, as we have before noticed; but, if he sues criminally, it is the duty of the judge to inflict an extraordinary punishment upon the offender; observing the constitution of Zeno, which permits all persons who have a right to be called illustrious, and, of consequence, all who enjoy a superior title, either to pursue or defend criminally any action of injury by their proctors; but the tenor of this law will more fully appear by a perusal of the ordinance itself.

XI. An action of injury does not only lie against him who hath done an injury, by giving a blow, &c. but also against him, who, by his craft and persuasion, hath caused the injury to be done.

XII. All right to an action of injury may be lost by dissimulation; and therefore, if a man takes no notice of an injury at the time in which he receives it, he cannot afterwards, although he repents of his former behaviour, commence a suit on account of that injury.

TITLE VI.

Of Obligations which arise from (quasi ex delicti) from constructive Criminality.

IF a judge make a suit his own, by giving an unjust determination, an action of male-feasance will not properly lie against him; but, although he is not subject to an action of male-feasance, or of contract, yet, as he hath certainly committed a fault, although it was not by design, but through imprudence and want of skill, he may be sued by an action of quasi-male-feasance; and must suffer such a penalty, which seems equitable to the conscience of a superior judge.

I. Whoever occupies a chamber, from whence any thing hath been either thrown or spilt, by which damage is done, he is liable to an action of quasi-male-feasance; and it is not material, whether the chamber is the property of the occupier; whether he pays rent for it; or whether he inhabits it gratis; and the reason why such occupier is not suable for a direct male-feasance, is, because he is generally sued for the fault of another. Any man is also subject to the same action, who hath hung or placed any thing in a public road, so as to endanger passengers by the fall of it; in which case, a penalty of ten aurei is appointed; but, when any thing hath been thrown or spilt, the action is always for the double of what the damage amounts to. If a freeman is killed by accident, the penalty is fifty aurei; but, if he only receives some hurt, the quantum of the damage is at the discretion of the judge, who ought to take the fees of the physicians into the account, and all other expences attendant upon the cure, over and above the time which the patient hath lost in his illness, or may lose by being unable to pursue his business.

II. If the son of a family lives separate from his father, and any thing is either thrown or spilt from his apartment, or so hung or placed, that the fall of it may damage, it is the opinion of Julian, that no action will lie against the father, and that the only son can be sued. The same rule of law is also to be observed, in regard to the son of a family, who hath acted as a judge, and given an unjust determination.

III. The master of a ship, tavern, or inn, is liable to be sued for a quasi-male-feasance, on account of every damage, or theft, done or committed in any of these places, by himself or his servants: for although no action, either of direct male-feasance, or of contract, can be brought against the master, yet, as he has, in some measure, been guilty of a fault, in employing dishonest persons as his servants, he is therefore subject to a suit for quasi-male-fea-

sance. But, in all these cases, the action given is an action upon the fact, which may be brought in favour of an heir, but not against him.

TITLE VI.

Of Actions.

Definition.

IT now remains, that we should treat of actions. An action is nothing more than the right, which every man has, of bringing an action at law for whatever is due to him.

First Division.

I. All actions in general, whether they are determinable before judges or arbitrors, may be primarily divided into two kinds, real and personal; for the plaintive must sue the defendant, either because the defendant is obligated to him by contract, or hath been guilty of some male-feasance; and, in this case, the action must be personal, in which the plaintiff alleges, that his adversary is bound to give, or to do something for his service; or some other matter, as the occasion requires: or otherwise, the plaintiff must sue the defendant, on account of some corporeal thing, when there is no obligation; in which case the action must be real: as for example, if Sempronius possesses land, which Titius affirms to be his property, the other denying it, Titius must bring a real action against Sempronius for the recovery.

Of the Confessory and Negatory Action.

II. Also, if any man brings an action, alleging, that he has a right to the usufruct of a field, or house, or a right of driving his cattle, or of drawing water in the land of his neighbour, such action is denominated real. And an action relating to the rights of houses or city estates, which rights are called services, is also of the same kind; as when a man commences a suit, and alleges, that he has a right of prospect, a right to raise the height of his house, a right of making a part of it to project, or a right of laying the beams of his building upon his neighbour's walls. There are also contrary actions to these, which relate to usufructs, and the rights of country and city estates; as when the complainant alleges, that his adversary is not entitled to the usufruct of a particular ground, or to the right of passage, &c. &c. These actions are also real, but are negative in their nature, and cannot therefore be used in regard to things corporeal; for, in respect to things corporeal, the agent, or plaintiff, is the person out of possession; for a possessor can bring no action; there are however,

many cases, in which a possessor may be obliged to act the part of a plaintiff; but we refer the reader to the books of the digests.

Of Prætorian Civil Actions.

III. The actions, of which we have made mention, and all actions of a similar nature, are derived from the civil law; but the prætor, by virtue of his jurisdiction, hath introduced other actions, both real and personal, of which it will be necessary to give some examples: for he often permits a real action to be brought, either by allowing the demandant to allege, that he hath acquired by prescription, what he hath not so acquired; or, on the contrary by permitting a former possessor to allege, that his adversary hath not acquired by prescription, what, in reality, he hath so acquired.

Of the Publician Action.

IV. If any particular thing, belonging to one man, should be delivered in trust to another, that it might be deposited with him upon some just account, as by reason of a purchase, a gift, a marriage, or a bequest, and it should so happen, that such trustee should lose the possession, before he hath gained a property in the thing possessed, he could have no direct action for the recovery of it: inasmuch as real actions are given by the law for the revindication of those things only, in which a man hath vested property or dominion. But, it being hard, that an action should be wanting in such a case, the prætor hath supplied one, in which the person, who hath lost his possession, is allowed to aver, that he hath a prescriptive right to the thing in question, although he hath not obtained it; and he may thus recover the possession. This action is called *actio Publiciana*, because it was first instituted by the edict of *Publicius* the prætor.

Of the Rescissory Action.

V. On the contrary, if any man, whilst he is abroad in the service of his country, or a prisoner in the hands of the enemy, should gain a prescriptive title to a thing, which belongs to another, who was not abroad, then the former proprietor is permitted at any time, within a year after the return of the possessor, to bring an action against him, the prescriptive title being rescinded, and the proprietor being allowed to allege, that the possessor hath not effectually prescribed, and that therefore the thing in litigation is his own. The same motive of equity hath also induced the prætor to allow the use of this species of action to certain other persons, as we may learn more at large from the digests.

Of the Paulinian Action.

VI. If a debtor disposes of any thing, by delivering it to some person in order to defraud his creditors, the creditors are then

permitted, notwithstanding the delivery, to bring an action for the thing, if they have previously obtained the sentence of the proper magistrate, for putting themselves into possession; that is, they are allowed to plead, that the thing was not delivered, and of course, that it continues to be a part of their debtor's goods.

Of the Servian or Hypothecary Action.

VII. Also the action Serviana, and the action quasi-Serviana, (which is also called hypothecary,) both take their rise from the prætor's jurisdiction. By the action Serviana, a suit may be commenced for the stock and cattle of a farmer, which are obligated as a pledge for the rent of the ground which he farms of his landlord. The action quasi-Serviana is that, by which a creditor may sue for a thing pledged or hypothecated to him; and, in regard to this action, there is no difference between a pledge and an hypotheque, though in other respects they differ; for by the term pledge is meant that which hath actually been delivered to a creditor, especially if the thing was a moveable; and, by the word hypotheque, we comprehend what is obligated to a creditor by a nude agreement only, without a delivery.

Of the Prætorian personal Actions.

VIII. Personal actions have also been introduced by the prætors, in consequence of their authority; such is the action "de pecunia constituta;" which much resembles that called "reciptia;" which we have now taken away by our constitution, as unnecessary; and whatever advantageous matter it contained, we have added it to the action "de pecunia constituta." The prætors have likewise introduced the action concerning the peculium of slaves, and the sons of families; and also the actions, in which the only question is, whether the plaintiff hath made oath of his debt; they have likewise introduced many others.

Of Money constituted.

IX. A suit may be commenced by the action "de pecunia constituta," against any person who hath engaged to pay money, either for himself or another, without stipulation; but, when there is a stipulation, the prætorian action is not wanted; for the performance of the promise may be inforced by the civil law.

Of the Peculium.

X. The prætor hath also given actions "de peculio" against fathers and masters, inasmuch as they are not legally bound by the contracts of their children and slaves: for it is but equity that parents and masters should be condemned to pay to the extent of a peculium, which is, as it were, the patrimony, and separate estate of a son, a daughter, or a slave.

Of Action on Oath.

XI. Also if any man, at the prayer or request of the adverse party, makes oath, that the debt which he sues for is unpaid and due to him, the prætor most justly indulges him with an action upon the fact; in which no inquiry is made whether the debt is due, but whether the oath hath been taken.

Of Penal Actions.

XII. The prætors have also introduced a great number of penal actions, by virtue of their authority. But, to mention some only out of many, they have provided, for instance, an action against him who hath wilfully damaged or erased an edict; against an emancipated son, or a freed-man, who hath commenced a suit against his parent or patron, without a previous permission from the proper magistrate; and also against any person, who, by force or fraud, hath hindered another from appearing to the process of a court of justice. But these are only some instances out of a great number, which might be produced.

Of prejudicial Actions.

XIII. Prejudicial actions are also real; such are those, by which it is inquired, whether a man is born free, or made free; whether he is a slave or a bastard. But of these actions, that only proceeds from the civil law by which it is inquired, whether a man is free born; the rest all take their rise from the prætor's jurisdiction.

Of Condiction.

XIV. Actions being thus divided into real and personal, it is certain that a man cannot sue for his own property by a condiction, or a personal action in the following form; viz. "If it appears that the defendant ought to GIVE it me:" for the act of giving implies the conferring of property, and therefore that which is the property of the plaintiff can never be understood to be given to him, or to become more his own than it already is. But, notwithstanding this, in order to shew a detestation for thieves and robbers, and to increase the number of actions which may be brought against them, it hath been determined, that, besides the double and quadruple penalty to which they are liable, they may be pursued by a condiction for the thing taken, in the very form before recited, if it appears that they ought to GIVE it. And this is allowed, although the party injured may also bring a real action against them, by which he may demand the thing taken as his own.

Of the Names of Actions.

XV. Real actions are called vindications; and personal actions,

in which it is intended, that something ought to be done or given, are called condictions; for the word *condicere* was in our old language of the same import with *denuntiare* to denounce: but the term condiction is now improperly used to denote a personal action, by which the plaintiff contends, that something ought to be given to him; for denunciations are not in use.

Second Division.

XVI. Actions are also further divided into those which are given, for the sake of obtaining the very thing in dispute; into those which are given for the penalty only; and, lastly, into mixed actions, which are given for the recovery both of the thing and the penalty.

Of Actions of Damages.

XVII. All real actions are given for the recovery of the thing in litigation; and almost all the personal actions, which arise from a contract, are also given for the recovery of the thing itself; as the action for a mutuum, a commodatum, or on account of a stipulation; also the action on account of a deposit, a mandate, partnership, buying and selling, letting and hiring. But when a suit is commenced for a thing deposited by reason of a riot, a fire, or any other calamity, the prætor always gives an action for a double penalty, besides the thing deposited, if the suit is brought against the depository himself, or against his heir, for fraud; in which case the action is mixed.

Of Actions for Penalty.

XVIII. In cases of male-feasance, some actions are given for the penalty only, and some both for the thing and the penalty: and these are therefore called mixed actions. But, in an action of theft, whether manifest or not manifest, nothing more is sued for than the penalty, which, in manifest theft as quadruple, and, in theft not manifest, double: for the owner may recover by a separate action whatever hath been stolen from him, if he alleges that the thing stolen is his own; and he is intitled to this action, not only against the thief, but against any other person who is in possession of his property. The thief may also be sued by a condiction, or personal action, for the recovery of the thing stolen.

Of mixed Actions.

XIX. An action for goods taken by force is a mixed action: because the value of whatever is included under the quadruple value to be recovered by the action; and thus the penalty is but triple. The action, introduced by the law Aquilia, on account of damage injuriously done, is also a mixed action; not only when it is given for double value against a man denying the fact, but

sometimes, when the action is only for single value; as when a man hath killed a slave, who at the time of his death was lame, or wanted an eye, but had within the year, previous to his decease, been free from any defect, and of great price; for in this case the defendant is obliged to pay as much as the slave was worth at any time within the year preceding his death, according to what has already been observed, b. 4. t. 3. A mixed action may also be brought against those, who have delayed to deliver a legacy, or gift in trust, given for the benefit of a church, or any other holy place, till they have been called before a magistrate for that purpose: for then they are compelled to deliver up the thing, or to pay the money bequeathed, and also the value of as much more, by way of penalty; and thus they are condemned to pay the double of what was due.

Of other mixed Actions.

XX. There are also some actions, which are of a mixed nature, by being, in effect, as well real as personal; of this sort is the action *familiæ erciscundæ*, which may be brought by coheirs for the partition of their inheritance; such also is the action *de communi dividundo*, given for the division of any particular thing or things, which, exclusive of an inheritance, are in common: and likewise the action *finium regundorem*, which takes place among those, whose estates are contiguous. And, in these three actions, it is wholly in the power of the judge to give the ground, or thing in dispute, to either of the parties litigant, and then to oblige that party, if necessity so requires, to recompense his adversary, by paying him a sum certain, in amends for any inequality in the adjudication.

Third Division.

XXI. All actions are for the single, double, triple, or quadruple value of the thing in litigation; for no action extends farther.

Of Actions for the simple Value.

XXII. The single value is sued for, when an action is given upon a stipulation, a loan, a mandate, the contract of buying and selling, letting and hiring; and also upon other very numerous accounts.

For double.

XXIII. The double value is sued for, in an action of theft not manifest, of injury, by virtue of the law Aquilia, and sometimes an action of deposit. The double value is likewise sued for, in an action brought, on account of a slave corrupted, against him, by whose advice such a slave hath fled from his mater, grown disobedient, luxurious, or become in any manner the worse; and,

in this action, an estimation is to be made of whatever things the slave hath stolen from his master, before his flight. An action for the detention of a legacy, left to an holy place, is also given for double the value, as we have before remarked.

For triple.

XXIV. A suit may be brought for triple value, when any person inserts a greater sum, than is due to him, in the libel of convention, to the intent, that the officers of any court may exact a larger fee, or sportule, from the defendant; in which case the defendant may obtain the triple value of the extraordinary fee from the plaintiff, including the fee in the triple value. The fees of officers are regulated by our constitution, and it is not to be doubted, but that the action, called *condictio ex lege*, may be given by virtue of that ordinance.

For quadruple.

XXV. A suit may be commenced for quadruple or fourfold value, by an action for theft manifest, by an action for putting a man in fear, and by an action on account of money, given to bring on a litigious suit against some third person, or on account of money given to desist from it. A condiction *ex lege*, for the quadruple value, arises also from our constitution against those officers of courts of justice, who demand any thing from the party defendant, contrary to the regulations of the said constitution.

Subdivision of Actions.

XXVI. But an action of theft not manifest, and an action on account of a slave corrupted, differ from the others, of which we have spoken, in that they always enforce a condemnation in double the value; but in an action, given by the law Aquilia for an injury done, and sometimes in an action of deposit, the double value may be exacted in case of a denial; yet whenever the party defendant makes a confession, then the single value is all, which can be recovered. But, when a demand is made by an action for a legacy to pious uses, due to any holy place or society, the penalty is not only doubled by the denial of the defendant, but also by any delay of payment, which may be adjudged to have given a just cause for citing the defendant before a magistrate; but, if the legacy is confessed and paid, before any citation issues at the command of the judge, the party complainant must rest satisfied with the single value.

Second Subdivision.

XXVII. An action for putting a man in fear differs also from other actions in *quadruplum*, because it is tacitly implied in the nature of this action, that the party, who hath obeyed the com-

mand of the judge or magistrate, in restoring the things taken, may be dismissed; for, in all other actions for the fourfold value, every man must be condemned to pay the full penalty, as in the action of theft manifest.

Of Actions of good faith.

XXVIII. The fourth division of actions is into those of good faith, and those of strict right. Those of good faith are the following; viz. actions of buying and selling, letting and hiring; of affairs transacted, of mandate, deposit, partnership, tutelage, loan, mortgage; of the partition of an inheritance, and of the division of any particular thing or things, which belong in common to diverse persons; also actions in prescribed words, which are either estimatory, or derived from commutation; and lastly that action, by virtue of which we demand an inheritance: for although it hath long been doubtful to what class this action belonged; yet it is now clearly determined by our constitution, that the demand of an inheritance is to be numbered among the actions of good faith.

Of Marriage-Portion Action.

XXIX. The action, called *rei uxoriæ*, which was given for the recovery of a marriage portion, was formerly numbered among the actions of good faith; but when, upon finding the action of stipulation to be more full and advantageous, we abrogated the action rei uxoriæ, and transferred all its effects, with the addition of many other powers, to the action of stipulation, which is given on account of marriage portions, we then not only thought, that this action of stipulation, as far as it related to marriage portions, deserved to be numbered with actions of good faith, but we also added to it, by implication, the full powers of an action of hypotheque; and we have likewise judged it proper, that women, in whose sole behalf we enacted our constitution, should be preferred to all other creditors by mortgage, whenever they themselves sue for their marriage portions.

Of the Discretion of the Judge.

XXX. In all actions of good faith a full power is given to the judge of calculating, according to the rules of justice and equity, how much ought to be restored to the plaintiff; and, of course, when the plaintiff is found to be indebted to the defendant in a less sum, it is in the power of the judge to allow a compensation, and to condemn the defendant in the payment of the difference; and, even in actions of strict right, the emperor Marcus introduced a compensation, by opposing an exception of fraud: but we have extended compensations much farther by our constitution, when the debt of the defendant is evident; so that actions

of strict right, whether real, personal, or of whatever kind they are, may be diminished by compensation; except only an action of deposit, against which we have not judged it proper to permit any compensation to be alleged, lest the pretence of compensation should give a colour and encouragement to fraud.

Of arbitrary Actions.

XXXI. There are also some actions which we call arbitrary, because they depend entirely upon the arbitration of the judge; for, in these, if the party does not obey the legal command of the court, by exhibiting whatever is required, by restoring the thing in litigation, or by paying the value of it, or by giving up a slave in consequence of an action of male-feasance, the judge ought immediately to proceed to condemnation by his definitive sentence. Of these arbitrary actions some are real and some personal: some are real, as the action Publiciana, Serviana, and quasi-Serviana, which is likewise called hypothecary: others are personal, as those by which a suit is commenced on account of something done by force, fear, or fraud: or on account of something which was promised to be paid or restored in a certain place; and the action *ad exhibendum*, which was given to the intent, that something particular should be exhibited, is also of the same kind: and, in all these and the like actions, the judge has full power to determine, according to the equity and nature of the thing sued for, in what manner and proportion the plaintiff ought to receive satisfaction.

Fifth Division.

XXXII. A judge ought always to take as much care as possible so to frame his sentence, that it may be given for a thing or sum certain; although the claim upon which the sentence is founded may be for an uncertain sum or quantity.

Of the Claim of more than is due.

XXXIII. Formerly, if a plaintiff claimed more in his libel than was due or belonged to him, he failed in his cause; that is, he even lost that which really did belong to him; nor was it easy for him to be restored to it by the prætor, unless he was under the age of 25 years: for in this, as well as in other cases, it was usual to aid minors, if it appeared, upon examination, that the error was owing to their youth; and whenever an error was such, that one of the most knowing of men might have been led into it, then even persons of full age might have been aided by the magistrate: as for example, if a legatee had demanded his whole legacy, and codicils were afterwards produced, by which a part of it was revoked, or new legacies bequeathed to other persons, so that the

plaintiff appeared to have demanded more than three-fourths of his legacy: because it was subject to a diminution by the law *falcidia*; yet, in such a case, the legatee would be relieved, notwithstanding the excess of his demand. It is here necessary to be observed, that a man may demand more than what is due to him in four several respects, viz. in respect to the thing itself; to time; to place; and to the cause. In respect to the thing itself; as when the plaintiff, instead of ten aurei, which are due to him, demands twenty; or if, when he is, in reality, the owner but of part of some particular thing, he claims the whole as his own, or a greater share of it than he is entitled to. In respect to time, as when the plaintiff makes his demand before the day of payment, or before the time of the performance of a condition; for, as he who does not pay so soon as he ought, is always understood to pay less than he ought, so, by a parity of reasoning, whoever commences a suit prematurely demands more than his due. In respect to place; as when any person requires, that what was stipulated to be given or delivered to him at a certain place, should be given or delivered to him at some other place, without taking any notice in his libel of the place specified in the stipulation; as if Titius, for example, should stipulate in these words: "Do you promise to give such a particular thing at Ephesus?" and should afterwards declare simply in his libel, that the same thing ought to be given to him at Rome: for Titius would thus be understood to demand more than his due, by endeavouring to deprive his debtor of the advantage which he might have had in paying his creditor at Ephesus. And, it is upon this account, that an arbitrary action is given to him who would demand payment in another place than that which was agreed upon; for, in that action, the advantage which might have accrued to the debtor, by paying his debt in the place stipulated, is always taken into consideration at the discretion of the judge. This advantage is generally found the greatest in merchandise; as in wine, oil, corn, &c. which in different places, bear different prices; and, indeed, money itself is not lent every where at the same interest. But if a man would sue the performance of a stipulation at Ephesus, or at any other place, where it was agreed, that the stipulation should be performed, he may legally commence his suit by a pure action, that is without mentioning the place; and this the prætor allows of, inasmuch as the debtor does not lose any advantage. Next to him, who demands more than his due, in regard to place, is he, who demands more than his due, in regard to the cause; as for instance, if Titius stipulates thus with

Sempronius;—"do you promise to give either your slave Stichus or ten aurei?" and then demands from Sempronius, either the slave specially, or the money specially: for in this case Titius would be adjudged to have demanded more than his due, the right of election being in Sempronius, by whom the promise was made; and therefore, when Titius sues either for the money specially, or for the slave, he deprives the adverse party of the power of election, and betters his own condition, by making that of his adversary the worse: and it is upon this account, that an action has been given, by which the party agent may make his demand conformable to the stipulation, and claim either the slave, or the money. And farther, if a man should stipulate generally, that wine, purple, or a slave, should be given him, and should afterwards sue for the wine of Campania, the purple of Tyre, or the slave Stichus in particular, he would then be adjudged to have demanded more than his due; for the power of election would thus be taken from the adverse party, who was not bound by the stipulation to pay the thing demanded; and although, in any of these cases, the thing sued for should be of little or no value, yet the demandant would be thought to claim more than his due; because it is often easier for the debtor to pay the thing stipulated, although it may be of greater value than the thing demanded.—Such was the law according to the ancient practice, in regard to an over-demand, viz. that the demandant should lose even that, which was really due to him. But this law has been greatly restrained by the constitution of Zeno the emperor, and by our own; for, if more than is due is demanded in regard to time, the judge must be directed in his proceeding by the constitution of that emperor of glorious memory; but, if more is demanded, in respect to quantity, or on any other account, then the loss suffered by him, upon whom the demand is made, must be recompensed, as we have before declared, by the condemnation of the party agent in triple damages.

Of the Claim of less than is due.

XXXIV. If a plaintiff sues for less, than what he has a claim to, demanding, for instance, only five aurei, when ten are due; or the moiety of an estate, when the whole belongs to him; he acts safely by this method, for the judge, in consequence of Zeno's constitution, may nevertheless condemn the adverse party, under the same process, to the payment or delivery of all, which appears of right to belong to the plaintiff.

Of an Error.

XXXV. When a plaintiff demands one thing instead of another, he risks nothing by the mistake, which he is allowed to correct

under one and the same process: as if a litigant should demand the slave Erotes, instead of the slave Stichus, or should claim, as due by testament, what is found to be due upon a stipulation.

Sixth Division. Of Peculium.

XXXVI. There are also some actions, by which we do not always sue for the whole, which is due to us; but for the whole, or less, than the whole, as it proves to be most expedient; thus, when a suit is brought against the peculium of a son or a slave, if the peculium is sufficient to answer the demand, the father or master must be condemned to pay the whole debt; but, if the peculium is not sufficient, the judge can condemn the defendants only to the extent of its value. We will hereafter explain, in its proper place, what we mean by the term *peculium*.

Of the Restitution of Dower.

XXXVII. Also, if a woman commences a suit for the restitution of her marriage portion, the man must be condemned to pay as far as he is able; i. e. as far as his income or faculties will permit: and therefore, if the portion demanded and the faculties of the man are equal, he must be adjudged to satisfy the whole demand; but, if his faculties are less than the claim, he must neverthelss be condemned to pay as much as he is able. But the claim of a woman may in this case be lessened by a retention; for the husband is permitted to retain an equivalent for whatever he hath necessarily expended upon the estate given with his wife, as a marriage portion; but this will fully appear by a perusal of the digests, to which the reader is referred.

Of Actions against Parents, &c.

XXXVIII. And, if any person commences a suit against his parent or patron, or if one partner sues another, the plaintiff can by no means obtain sentence for a greater sum, than his adversary is able to pay; and the same is to be observed, when a donor is sued on account of his donation.

Of Compensations.

XXXIX. When a compensation is alleged by the defendant, it generally happens, that the plaintiff recovers less than his demand, for it is in the power of the judge, as we have before declared, to make an equitable deduction from the demand of the plaintiff of whatever he owes to the defendant, and to condemn the defendant to the payment only of the remainder; as it hath already been observed.

Of the Creditors of Insolvents.

XL. Creditors also, to whom a debtor hath made a cession of his goods, may afterwards, if he hath gained any considerable

acquisition, bring a fresh suit against him, for as much as he is able to pay, but not more; for it would be inhuman to condemn a man *in solidum*, who hath already been deprived of his whole fortune.

TITLE VII.

Of Business done with Those under Power.

WE have already made mention of the action, by which a suit may be brought against the peculium, or separate estate of a son or a slave: but it is now necessary to speak of it more fully, and also of some other actions, which are given on account of children and slaves against their parents and masters. But, inasmuch as the law is almost the same, whether an affair is transacted with a slave, or with him, who is under the power of his parent, we will therefore, to avoid being prolix, treat only of slaves and their masters, leaving what we say of them to be understood also of parents and children under power; for, whenever there is any thing peculiar to be observed, in regard to children and parents, we intend to point it out separately.

Of what is done by Command of the Master.

I. If any business is negotiated by a slave, who acts by the command of his master, the prætor will give an action against the master for the whole value of the transaction; for whoever makes a contract with a slave, is presumed to have done it upon a confidence in the master.

Of the Exercitory and Institory Actions.

II. The prætor also gives two other actions *in solidum* upon the same motive; the one of which is called *exercitoria*, the other *institoria*. The action exercitoria takes place, when a master hath constituted his slave to be the commander of a vessel, and some contract hath been entered into with such slave merely upon that account and this action is named exercitoria, because he to whom the profits of a ship or vessel appertain, is called *exercitor*. The action institoria is made use of, when a master hath given his slave the management of a ship, or committed any particular affair to his direction, by which some one hath been induced to enter into a contract with such slave; and this action is called institoria, because all persons, to whom a negociation is committed, are denominated *institores*. The prætor hath likewise been induced, by the same equity, to give these two actions against any man who employs a free person, or the slave of another, in the management of a ship, a warehouse, or any particular affair.

Of the Tributory Action.

III. The prætor hath also introduced another action called *tributoria*, or tributory; for if a slave, without the command, but with the knowledge of his master, traffics with the product of his peculium, and persons are thus induced to contract with him, the prætor ordains, that the merchandize, or money, arising from his traffic, shall be distributed between the master, (if he has any just claim,) and the rest of the creditors, in a ratable proportion; and the master himself is always permitted to make the distribution; but, if any creditor complains that too small a share hath been apportioned to him, the prætor will allow him to use the before-named action, which is called tributoria, on account of the distribution.

Of the Action respecting the Peculium.

IV. The action concerning a *peculium*, and things converted to the profit of the master of a slave, hath likewise been introduced by the prætor; for although a contract hath been entered into by a slave, without the consent of his master, yet, where the money arising from it is converted to the benefit of such master, the master ought to be answerable for the performance of it; and, even although the master should receive no emolument from the transaction, yet it is right, that he should be answerable for as much as the peculium of his slave is found to be worth. But, to be more explicit, we understand, that, whenever money, or any other thing, is necessarily used or expended by a slave upon his master's affairs, it is a conversion of it to his benefit; as for example, if a slave, who hath borrowed money, should pay the debts of his master, repair his buildings, purchase an estate, provision, or any other thing, which is useful: and therefore, if out of ten aurei, borrowed by a slave, he should pay only five to his master's creditors, and squander the rest, the master would nevertheless be condemned to the payment *in solidum* of the five aurei, which had been expended for his use; but, as to the other five, he could be obliged to pay only so much as the peculium would answer; and from hence it will appear, that, if all the ten aurei, which were borrowed, had been converted by the slave to his master's emolument, the lender might have recovered the whole ten from the master; for although it is one and the same action, by which a suit is commenced against a peculium, and for the recovery of what a slave hath converted to his master's use, yet this action carries with it two different condemnations; and it is for this reason, that the judge does not begin to make an estimate of the value of the peculium, till he has previously examined, whether

the whole, or any part of the money, arising from the slave's contract, hath been expended for the service of the master: but, when the judge proceeds to the valuation of the peculium, a deduction is made of whatever the slave owes to his master, or to any other under the power of his master, and the remainder only is understood to be strictly the peculium, and chargeable with debts due to strangers. But it sometimes happens, that what one slave owes to another, under the power of the same master, is not deducted; as when the slave, who is the creditor, composes a part of his debtor's peculium; for, if a slave is indebted to his vicarial slave, this debt cannot be deducted from the peculium.

Of the Concurrence of Actions.

V. It is, nevertheless, not to be doubted, but that he who hath made a contract with a slave at the command of the master of that slave, and is entitled either to the action institoria or exercitoria, is also entitled to the action *de peculio* and *de in rem verso*; but it would be highly imprudent in any party to relinquish an action, by which he could most easily recover his whole demand, and, by recurring to another, reduce himself to the difficulty of proving that the money he lent to the slave was turned to the use of the master, or that the slave is possessed of a peculium sufficient to answer the whole debt. He also, to whom the action tributoria is given, is equally entitled to the action de peculio, and de in rem verso; but it is expedient, in some cases, to use the one, and in some cases the other: yet it is frequently most expedient to use the action tributoria; because, in this, the condition of the master is not principally regarded; i. e. there is no previous deduction made of what is due to him, his title being esteemed in the same light with that of other creditors: but, in the action de peculio, the debt due to the master is first deducted, and he is condemned only to distribute the remainder among the creditors. Again, in some cases, it may be more convenient to commence a suit by the action de peculio, because it affects the whole peculium, whereas the action tributoria regards only so much of it as hath been made use of in traffic; and it is possible that a slave may have trafficed only with a third, a fourth, or some very small part, and that the rest consists of lands, slaves, or money lent at interest. Upon the whole, therefore, it greatly behoves every man to chuse that remedy which may be most beneficial to him; but, if the creditor of a slave can prove a conversion to the use of the master of that slave, he ought most certainly to commence his suit by the action de in rem verso.

Of Children.

VI. We understand what we have said concerning a slave and his master to take place equally in regard to children under power and their parents.

Of the Macedonian Senatus-Consultum.

VII. But children are, in some respects, particularly regarded by the Macedonian decree of the senate, which prohibits money to be lent them, whilst they are under the power of their parents; for creditors are not suffered to bring any action, either against the children, even after they are emancipated, or against their parents, who emancipated them. This was a caution which the senate thought proper to take, because young heirs, who were loaded with their debts, contracted for the support of luxury, have often endeavoured, by private methods, to take away the lives of their parents.

Of the direct Action against the Father and Master.

VIII. But, in fine, we must observe, that whatever hath been contracted for at the command of a parent or master, and converted to their use, may be recovered by a direct action against the father or master, in the same manner, as if the contract had been originally made with them. And it is likewise certain, that he who is liable to the action *institoria* or *exhibitoria*, may also be sued by a direct action, inasmuch as the contract is presumed to have been made at his command.

TITLE VIII.

Of Noxal Actions.

Of Slaves.

NOXAL actions are given on account of the offences of slaves; as when a slave commits a theft or robbery, or does any other damage or injury. And, when the master or owner of a slave is condemned upon this account, it is in his option either to pay the valuation of the damage done, or to deliver up his slave as a recompense.

Of what is Noxa and Noxia.

I. The term noxa denotes the slave, by whom the male-feasance was done; and, by the word noxia, we understand the male-feasance itself, be it of what kind it will, theft, damage, rapine, or injury.

The Reason of these Actions.

II. It is with the utmost reason allowable, that a master should

deliver the slave, who is culpable, as a full compensation to the party injured; for it was unjust, that it should be in the power of slaves to cause their masters to suffer any greater damage, than the value of their own bodies would amount to.

Effect of the surrender of the Slave.

III. If a noxal action is given against a master, he may free himself from it by delivering his slave into the possession of the plaintiff, in whom the property in such slave will become absolutely vested; but, if the slave can pay his new master in money the value of the damage, the slave may be manumitted by the assistance of the prætor, although his new master is ever so unwilling.

Of the Origin of these Actions.

IV. Noxal actions are constituted either by the laws, or by the edict of the prætor. They are constituted on account of theft by the law of the twelve tables, and, on account of damage injuriously done, by virtue of the law Aquilia. But, on account of injuries and goods taken by force, they are constituted by the edict of the prætor.

Of the Object of the Noxal Action.

V. Every noxal action follows the person of the slave, by whom the male-feasance was committed; but, as long as he continues under the power of his master, his master only is liable to an action; and, if he becomes subject to a new master, then the new master becomes liable: but, if the slave is manumitted, he may be prosecuted by a direct action; for then the *noxæ deditio* is extinguished; because no surrender can then be made of him by whom the male-feasance was committed. But, on the contrary, an action, which was at first direct, may afterwards become noxal; for if a man, who is free, does any male-feasance, and afterwards becomes a slave, (and we have in our first book declared in what cases this may happen,) then the action, which was before direct, begins to be a noxal action against his master.

A Male-feasance against the Master.

VI. Although a slave commits a male-feasance against his master, yet no action is given; for no obligation can arise between a master and his slave, and therefore, if that slave passes under the power of another master, or is manumitted, no action can be brought either against him in his own person, or against his new master; from whence it follows, that if the slave of another should commit any male-feasance, for example, against Titius, and should afterwards become the slave of the same Titius, the action is ex-

tinguished; for it is a maxim, that an action becomes extinct, whenever it is brought into a state, in which it could not have had a commencement: and hence it is, that although a slave, from whom a master hath received damage, should cease to be under the power of that master, yet no action can afterwards be given against such slave; neither can a slave, who hath been aliened or manumitted, bring any action against his late master, by whom he hath been ill treated.

Of Children.

VII. The ancients indeed admitted this law of the forfeiture of the person to take place, even in cases, in which their children were concerned, whether male or female: but the later ages have rightly thought, that such a rigorous proceeding ought, by all means, to be exploded; and it hath therefore passed wholly into disuse: for who could suffer a son, and more especially a daughter, to be delivered up as a forfeiture to a stranger? for, in the case of a son, the punishment of the father would be greater, than that of the son; and, in the case of a daughter, the rules of modesty forbid such a practice. It hath therefore prevailed, that noxal actions should only take place in regard to slaves; and, in the books of the ancient commentators of the law, we find it often repeated, that the sons of a family may themselves be convened for their own misdeeds.

TITLE IX.

Of Damage done by Quadrupeds.

Of the Action in this case.

A noxal action is given by the law of the 12 tables, whenever any damage is done by brute animals, through wantonness, fright, or furiousness; but, if they are delivered up in atonement for the damage done, the defendant must be discharged from the action: for it is thus written in the law of the 12 tables, "if an horse, apt to kick, should strike with his foot; or if an ox, accustomed to gore, should wound any man with his horns, &c." But a noxal action takes place only in regard to those animals, which act contrary to their nature; for, when the ferocity of a beast is innate, no action can be given; so that, if a bear breaks loose from his master, and mischief is done, the person, to whom this animal belonged cannot be convened; for he ceased to be the master as soon as the beast escaped. But it is here to be noted, that the word *pauperies* denotes a damage, by which no injury is intended; for an animal, which hath no reason, cannot be said to have committed an injury. This is what relates to noxal actions.

Of the Ædilitian Action.

I. It must be observed, that the edict of the Edile prohibits any man to keep a dog, a boar, a bear, or a lion, where there is a public passage or highway: and, if this prohibition is disobeyed, and any freeman receives hurt, the master of the beast may be condemned in whatever sum seems agreeable to equity in the opinion of the judge; yet, in regard to every other damage, the condemnation must be in the double of what the damage amounts to. It is here necessary to inform the student, that not only the Ædilitian action, but also an action for the damage, called *pauperies*, may both take place against the same person; for, although actions, and more especially those, which are penal, concur together on account of the same thing, they are not destructive the one of another.

TITLE X.

Of Agents.

Of Law Agents.

ANY man may commence a suit, either in his own name, or in that of another; as in the name of a proctor, a tutor, or a curator: but anciently, one person could not sue in the name of another, unless in a cause of liberty, tutelage, or where a society was concerned. It was afterwards permitted by the law *Hostilia*, that an action of theft might be brought in the name of those, who were captives in the hands of the enemy,—or who were absent upon the affairs of the republic,—or who were under the care of tutors. But, as it was found in later times to be highly inconvenient, that any man should be prohibited, either from suing, or defending in the name of another, it by degrees became a practice to sue by proctors; for ill-health, old age, the necessity of voyaging, and many other cases, continually prevent mankind from being able to prosecute their own affairs in person.

How the Proctor is appointed.

I. It is not necessary to use any certain form of words in appointing a proctor, nor to make the appointment in the presence of the adverse party; for it is generally done even without his knowledge: and note, that whoever is employed either to sue or to defend for another, is understood to be a proctor.

How Tutors and Curators are appointed.

II. We have already explained in the first book of our institutions, how tutors and curators may be appointed.

TITLE XI.

Of Securities.

Of Personal Judgment.

IN taking security, the ancients pursued a different method from that, which the moderns have made choice of; for anciently, if a real action was brought, the defendant, or party in possession, was compelled to give security, to the end, that, if he lost his cause and would neither restore the thing itself, nor pay the estimation of it, the demandant might be enabled either to sue such defendant, or the parties bound for him; and this species of caution is termed *judicatum solvi:* nor is it difficult to understand, why it is so called; since every demandant stipulated, that the thing adjudged to him should be paid. We have already observed, that whoever defended his own cause, was obliged to give security, it is therefore with much greater reason, that the proctor in the cause of another should be compelled to give caution. But, if a demandant in a real action had sued in his own name, he was under no necessity of giving security; yet, if he sued only as a proctor, he was obliged to give caution, that his acts would be ratified by his principal, *rem ratam dominum habiturum*; for the danger was, lest the client or party principal should bring a fresh suit for the same thing: and, by the words of the edict, even tutors and curators were compellable to give caution, as well as proctors, though it was sometimes remitted, when tutors, or curators, were demandants; and such was the practice in regard to real actions.

I. The same rules, which were observed in real, obtained also in personal actions, in regard to the taking security on the part of the plaintiff; and, if the defendant in a personal action proceeded in another's name, he was obliged to give caution; for no one was reputed a competent defendant in the cause of another, unless security was given; but, whenever any man was convened in a personal action to defend his own cause, he was not compelled to give caution, that the thing adjudged should be paid.

New Law.

II. But at present we observe a very different practice; for, if a defendant is now convened either in a real or personal action, in his own cause, he is not compellable to give security for the payment of the estimation of the suit, but only for his own person; to wit, that he will remain in judgment till the cause is determined: and this security is sometimes given by sureties; sometimes by a promise upon oath, which is called a juratory caution; and sometimes by a simple promise without an oath, according to the quality of the person of the defendant.

Of the Proctor of the Plaintiff.

III. But, if a suit is commenced or defended by a proctor, the proctor of the plaintiff, if he does not either, enrol a mandate of appointment in the acts of court, or cause his client to nominate him publicly, is obliged to give security, that his client will ratify his proceeding. The same rule is also to be observed, if a tutor, curator, or any person, to whom the management of the affairs of others is entrusted, commences a suit by a proctor.

Of the Proctor of the Defendant.

IV. But, when a party is convened, if he is ready to nominate a proctor, such party may appear in open court, and confirm the nomination, by giving the caution *judicatum solvi* under the usual stipulation; or he may appear out of court, and become himself the surety, that his proctor will perform all the covenants in the instrument of caution; and whether the party convened does this in court, or out of court, he is obliged to make his estate chargeable, that his heirs, as well as himself, may be liable to an action. And a farther security must likewise be given, that he will either appear in person at the time of pronouncing sentence, or that his sureties, in case of his non-appearance, shall be bound to pay whatever the sentence exacts, if no appeal is interposed.

Of the same.

V. When a defendant does not give an appearance, then any other person, who is willing, may take upon himself the defence for him, and this may be done either in a real or personal action, without distinction, if the caution *judicatum solvi* is entered into for the payment of the estimation of the suit; for no man, (according to the ancient rule already mentioned,) can be said to defend the cause of another legally, unless security is given.

VI. But all such formalities may be more perfectly learned from the usage and practice of courts.

VII. We have judged it expedient, that these forms shall obtain, not only in Constantinople, but also in all our other provinces, in which a different practice may have hitherto prevailed through the want of knowledge; for it is necessary, that all the provinces should be guided by the example of the capitol of our dominions, and follow the practice of our royal city.

TITLE XII.

Of Perpetual and Temporal Actions.

ALL those actions which took their rise from the law, the decrees of the senate, or the constitutions, were antiently reputed

perpetual; but the latter emperors have, by their ordinances, fixed certain limits both to real and personal actions. Actions, given by virtue of the prætor's authority, are generally limited to the space of one year; for such is the duration of his office: but sometimes the prætorian actions are made perpetual; that is, they are extended to the limits introduced by the constitutions: such are those actions which the prætor gives to the possessors of goods, and to others who hold the place of heirs. The action of manifest theft is also perpetual, although it proceeds from the mere authority of the prætor; for it was thought absurd that this action should determine within the space of a year.

Of Actions which pass to the Heirs.

I. But all actions in general, which either the law or the prætor gives against any man, will not also be given against his heirs; for it is a most certain rule of law, that penal actions, arising from a male-feasance, will not lie against the heir of an offender; as, for instance, actions of theft, rapine, injury, or damage injuriously done; but nevertheless these actions will pass to heirs, and are never denied, but in an action of injury, and in other cases of a similar nature; yet sometimes even an action of contract will not lie against an heir; as when a testator acts fraudulently, and nothing comes to the possession of the heir by reason of the fraud: but, if the penal actions, of which we have already spoken, are once contested by the principal parties concerned, they will afterwards pass both to and against the heirs of such parties.

Of Satisfaction during the Cause.

II. It remains to be observed, that, if the defendant before sentence gives full satisfaction to the plaintiff, it is the duty of the judge to dismiss such defendant, although, at the time of contestation of suit, his cause was so bad, that he deserved to be condemned; and, upon this account, it was anciently a common saying, that all actions were dismissible.

TITLE XIII.

Of Exceptions.

Principle of Exception.

IT follows, that we should treat of exceptions. Exceptions have been introduced into causes for the defence of the party cited; for it often happens, that a suit, which in itself is just, may yet become unjust, when commenced against a wrong person.

Of Exception on account of Fear and Fraud.

I. If a man, who is compelled by fear, or induced by fraud or mistake, makes a promise to Titius, for example, by stipulation; yet it is evident that he is bound by the civil law, and that Titius may have an efficacious action; but it would be unjust, that a condemnation should follow; and therefore the party who made such promise is permitted to plead exceptive matter in bar to the action, by setting forth, that the promise was extorted by fear or fraud, or otherwise by alleging the peculiar circumstances of the case, whatever they are; and these are called exceptions *in factum compositæ*; i. e. exceptions on the fact.

On account of Money not paid.

II. The same practice prevails, if Sempronius, for example, causes Titius to stipulate to repay him money, which Titius never received from him. It is certain that Sempronius in this case may bring an action; for Titius is bound by the stipulation; yet, as it would be unjust that he should be condemned upon that account, he is allowed to defend himself by an exception *pecuniæ non numeratæ*, i. e. on account of money not paid. But by our express constitution we have shortened the time allowed for bringing this exception, as we have already observed in the former book.

Exception of Compact.

III. And farther, although a debtor enters into a compact with his creditor, that his creditor shall not sue him, yet the debtor remains bound; for obligations are not to be wholly dissolved by a mere agreement: and therefore an action in this form, *si paret, eum dare oportere*, would be efficacious against the debtor; but, as it would be unjust, that the debtor should be condemned to make payment, notwithstanding the agreement, he is therefore permitted to defend himself by an exception of compact.

By Oath.

IV. If an oath is administered to a debtor at the instance of his creditor, and such debtor swears, that nothing is due from him, yet he still remains obligated: but, as it would not be right, that the plaintiff should afterwards complain of perjury, the debtor may defend himself by alleging his own oath by way of exception. Exceptions of this sort are likewise equally necessary in real actions; as when the party in possession takes an oath at the request of the demandant, and swears, that the thing in dispute is his own, and the demandant will nevertheless endeavour to recover it: for although the demandant's allegation is true; viz. that the

thing claimed appertains to him; yet it is unjust, that the possessor should be condemned.

Of a thing formerly adjudged.

V. If a man hath been sued either upon a real or personal action, the obligation nevertheless remains; and therefore, in strict law, he may again be sued upon the same account; but, in case of a second suit, he may be relieved, if he alleges by way of exception, that the cause hath already been adjudged.

Other exceptions.

VI. It may suffice to have given these instances of exceptions in general; but in how many and in what various cases they are necessary, may be more fully learned from the larger books of the digests.

First Division.

VII. Some exceptions proceed from the laws themselves, or from those regulations, which hold the place of laws; but others take their rise from the authority of the prætor.

Second Division.

VIII. Some exceptions are called perpetual and peremptory; others are termed temporary and dilatory.

Of Peremptory Exceptions.

IX. The perpetual and peremptory are those, which always obstruct the party agent, and destroy the force of the action—of this sort is the exception of fraud, of fear, and of compact, when it is agreed, that the money shall not be sued for.

Of Dilatory.

X. Temporary and dilatory exceptions are those, which operate for a time, and create delay; such is the exception of an agreement not to pursue a debt within a certain time, as within five years; but at the expiration of that time the creditor may proceed: and therefore those, against whom an exception of agreement, or any other similar exception can be objected, must delay their action, and not sue, till the time agreed upon is expired; and it is for this reason, that those exceptions are termed dilatory; and formerly if the party agent had sued within the time, in which it was agreed not to sue, and an exception was interposed, it not only hindered such parties from obtaining in that cause, but it also disabled them from proceeding, even after the expiration of the time agreed on; for they were reputed to have lost their right, by having commenced a temerary suit. But we have been willing to mitigate this rigour, and have decreed, that whoever presumes to commence a suit before the time limited by the agreement, shall

be subject to the constitution of Zeno concerning those, who demand more than their due: and, if a party agent breaks in upon the time, which he has before spontaneously allowed, or contemns the limits, which the nature of some actions allow, the party defendant, who suffers such injurious treatment, becomes entitled to twice the time before allowed, and, even when that is expired, can not be obliged to give an appearance, till he has been reimbursed the whole of his expences; and this we have ordained in *terrorem*, that all plaintiffs may be taught to observe the proper time of commencing their suits.

Of Dilatory by reason of the Person.

XI. Dilatory exceptions may also arise by reason of the person of the party suing; such are those, which are made against proctors; as if a suitor should employ a soldier, or a woman to act for him: for soldiers are not permitted to appear in any cause, even in behalf of a father, a mother, or a wife, although they obtain the sanction of an imperial rescript; but they are allowed to act in their own affairs, without offending against military discipline. But we have put a stop to the exceptions of infamy, which were formerly made, both against proctors and their constituents, having observed them to be little practised, and fearing, lest by means of such altercations, a disquisition into the merits of causes should be retarded.

TITLE XIV.

Of Replications.

Of the Replication.

SOMETIMES an exception, which appears at the first view to be valid, is nevertheless not so; and, when this happens there is a necessity for an additional allegation in aid of the plaintiff, which is called a replication, because the force of the exception is replicated, that is, unfolded, and destroyed by it; as if a creditor should covenant with his debtor not to sue him, and it should afterwards be agreed between them, that the creditor may sue, in consequence of which agreement the creditor brings an action, to which the debtor excepts, alleging the agreement of his creditor not to sue him; in this case, the exception would be of weight; for, as such an agreement was entered into, it remains good, although a subsequent one was afterwards made to a contrary effect: but, as it would be unjust, that a creditor should be concluded by the exception, he is allowed to make a replication, by reason of the subsequent compact.

Of Duplication.

I. It also sometimes happens, that a replication at first appears to be concludent, though it is not so in reality; and, when it so happens, then another allegation, called a duplication, must be offered in support of the defendant.

Of a Triplication.

II. And when a duplication carries with it an appearance of justice, but is, upon some account, injurious to the party agent, he may also, in his turn, give another allegation, which is termed a triplication.

Of other Exceptions.

III. But the great variety of business, which continually occurs, often extends the use of all these exceptions, much farther, than we have mentioned; but of these a fuller knowledge may be obtained by a perusal of the larger volumes of the digests.

Of Exceptions by Bondsmen.

IV. The exceptions, by which a debtor may defend himself, are generally allowed to be used by his bondsmen; and this is a right practice: for a demand, made upon them, is, as it were, a demand upon the debtor himself, who is compellable by an action of mandate to pay over to his sureties whatever they have been obliged to pay upon his account: and therefore, if a creditor hath covenanted with his debtor not to sue him, the bondsmen of such debtor may be aided by an exception of compact, in the same manner, as if the promise had been made expressly to them. But there are some exceptions, which cannot be made use of in behalf of sureties; for although, when a debtor hath made a cession of his goods, he may defend himself by alleging that cession, as an exception to a suit brought by a creditor, yet the same exception cannot be alleged by the bondsmen; and the reason is evident: for whoever demands sureties hath always this principally in view, that he may be able to recover his debt from those sureties, in case of failure in the principal debtor.

TITLE XV.

Of Interdicts.

Definition.

WE are now led to treat of interdicts, or of those actions, which supply their place. Interdicts were certain forms of words, by which the prætor either commanded or prohibited something to be done; and these were chiefly used when any contention arose concerning possession, or *quasi*-possession.

First Division.

I. The first division of them is into prohibitory, restoratory, and exhibitory interdicts. The prohibitory are those, by which the prætor prohibits something to be done, as when he forbids force to be used against a lawful possessor; or against a person, who is burying another, where he hath a right; or when he forbids an edifice to be raised in a sacred place, or hinders a work from being erected in a public river, or on the banks of it, which may render it less navigable. The restoratory are those interdicts, by which the prætor orders something to be restored, as the possession of goods to the universal successor, who has been kept out of possession by one, who hath no right; or when the prætor commands possession to be restored to him, who hath been forcibly ejected. And the exhibitory interdicts are those, by which the prætor commands some exhibit to be made, as of a slave, for example, concerning whose liberty a cause is depending; or of a freed-man, from whom a patron would exact the service due to him; or of children to their parent, under whose power they are. Some nevertheless imagine, that interdicts can with propriety be only prohibitory, because the word *interdicere* signifies to denounce and prohibit; and that the restoratory and exhibitory interdicts might more properly be called decrees: yet it hath obtained by usage, that they should all be termed interdicts, because they are pronounced between two, *(inter duos dicuntur,)* the demandant and the possessor.

Second Division.

II. The second division of interdicts is into those, which are given for the acquisition, the retention, or recovery of a possession.

Of Interdicts of Acquisition.

III. An interdict for the acquisition of possession is given to him whom the prætor appoints to be the possessor of the goods of a deceased person. This interdict is called *Quorum bonorum*, and the effects of it are, that it obliges all persons who retain goods in their hands as heirs or possessors, to restore such goods to them to whom the possession of them hath been committed by the magistrate; and note, that he is reputed to possess, as heir, who thinks and takes himself so to be; and that he is deemed to possess, as possessor, who, without authority, retains a part, or the whole, of an inheritance, knowing that the possession does not belong to him. An interdict of acquisition is so called, because it is useful to him only who first endeavours to acquire the possession; and therefore this interdict would be useless to any

one who had once acquired a possession, but afterwards lost it. The interdict called the Salvian interdict is also appointed for the acquisition of possession; and is used by the proprietors of farms, in order to acquire the goods which their tenants have pledged and engaged, as a security for the payment of rent.

Of Interdicts of Retention.

IV. The interdicts *Uti possidetis* and *Utrubi* have been introduced for the sake of obtaining possession; for, when there is a controversy between two parties concerning property, it is necessary to enquire which of them is in possession, that it may be known which of them ought to be the demandant; for, till the possession is ascertained, an action of demand cannot be instituted; and natural reason teaches us, that, when one of the parties is in possession, the other must, of course, be the demandant in the suit: but, as it is by far more advantageous to be the possessor than the demandant, there is generally great contention for the possession; for although the possessor is not in reality the true proprietor, yet the possession will still remain in him, if the plaintiff does not prove the thing in litigation to be his own: and therefore, when the rights of parties are not clear, the sentence is always against the demandant. By the interdict *Uti possidetis*, the possession of a farm or house is contended for; and, by the interdict *Utrubi*, the possession of things moveable is disputed. These interdicts anciently differed much in their force and effects: for, by the interdict *Uti possidetis*, that party who was in possession at the time of bringing the interdict, prevailed, if he had not obtained the possession from his adversary by force, clandestinely, or precariously; but it was not material in what manner the possessor had obtained the possession from any other person: and, by the interdict *Utrubi*, that party prevailed who had been in possession for the greatest part of the year preceding the contest, if he had not acquired that possession clandestinely, precariously, or by force. But the present practice is nevertheless otherwise; for the power of both interdicts in regard to possession is now made equal; so that in any cause, instituted either for things moveable or immoveable, that party prevails who was in possession at the time of contesting the suit, if it is not made apparent that he gained such possession by force, by clandestine means, or precariously.

Of retaining and acquiring Possession.

V. A man is regarded as a possessor, not only when he is himself in possession, but also when any other, who is not under his power, holds possession in his name; as, for instance, a farmer,

or a tenant. Any person may also possess, by means of those to whom he hath committed the thing in litigation, either as a deposit or a loan; and this is what is meant by saying, that a possession may be retained by any one, by means of another, who possesses in his name. It is moreover held, that a possession may be retained, by the mere intention only; for although a man is neither in possession himself, nor any other for him, but has quitted the possession of certain lands with an intent to return to them again, he shall nevertheless be deemed to continue in possession. We have already explained, in our second institution, by what persons any man may acquire possession; and although it may be retained *solo animo*, that is, by an intention only, yet it is indubitable, that a mere intention is not sufficient for the acquisition of possession.

Of the Interdict of recovering.

VI. The interdict for the recovery of possession is generally made use of when any person hath been forcibly ousted from the possession of his house or estate; for the party ousted is then entitled to the interdict *Unde vi*, by which the intruder is compelled to restore him to possession, although he, who had been thus forcibly ousted, was himself in possession by clandestine means, by force, or precariously. But, as we have before observed, it is provided, by the imperial constitutions, that, whenever any man seizes a thing by force, if it is his own, he shall lose his property in it; and, if it belongs to another, he shall be compelled, not only to make restitution, but also to pay the full value to the party who suffered the force. But whoever ousts another of possession by force, is likewise subject to the law Julia, *de vi privata*, or *de vi publica*:—if the seising or intrusion was effected without weapons, then the offender is only liable to the law *de vi privata*; but if it was effected by an armed force, he is then subject to the law *de vi publica*. We comprehend not only shields, swords, and helmets under the term arms, but also clubs and stones.

Third Division.

VII. The third division of interdicts is into simple and double interdicts; the simple are those, in which there is both a plaintiff and a defendant; and of this sort are all restoratory and exhibitory interdicts: for the plaintiff, or demandant, is he, who requires something to be exhibited or restored; and the defendant is he, from whom the exhibition or restitution is required. But of the prohibitory interdicts some are simple, some double; they are simple, when the prætor forbids something to be done in a sacred

place, on a public river, or upon the banks of it; and the demandant is he, who desires, that some act should not be done, and the defendant is he, who endeavours to do it. The interdicts *Uti possidetis* and *Utrubi* are instances of the double interdicts: and they are called double, because in these the condition of either litigant is equal, the one not being understood to be more particularly the plaintiff or the defendant, than the other; inasmuch as each sustains the part of both.

VIII. It would be superfluous at this day to speak of the order and ancient effect of interdicts; for, when judgments are extraordinary, (and at present all judgments are so,) an interdict is rendered unnecessary,; and judgments are therefore now delivered without interdicts, in the same manner, as if a beneficial action was given in consequence of an interdict.

TITLE XVI.

Of the Penalties of false Litigation.

Of Penalties in general.

OUR legislators and magistrates have ever been careful to hinder mankind from entering into rash and litigious contentions: and we also are studious to effect the same purpose. And, that such suits may be the better prevented, the rashness both of plaintiffs and defendants hath been properly restrained, by pecuniary punishments, the coercion of an oath, and the fear of infamy.

Of the Oath and Penalty of Prosecuting.

I. By virtue of one of our constitutions, an oath must be administered to every man, against whom an action is brought; for a defendant is not permitted to plead, till he hath first sworn, that he proceeds as a contradictor, upon a firm belief, that his cause is good. But actions lie, in particular cases, for double and triple value against those, who have given a negative issue; as when a suit is commenced on account of injurious damage, or for a legacy left to a sacred place, as a church, hospital, &c. There are also actions, upon which more than the simple value is recoverable at the time of their commencement; as upon an action of theft manifest, which is for fourfold the value; and upon an action of theft not manifest, which lies for double the value; because in these, as well as in some other cases, the action is at first given for more than the simple value, whether the defendant denies or confesses the charge brought against him. But the calumny of the plaintiff is also under restraint, for he too is compelled by our constitution to swear, that he did not commence the suit with an

intention to calumniate; but upon a thorough confidence, that he had a good cause: and, what is more, the advocates on both sides are likewise compellable to take a similar oath, the substance of which is set forth in another of our constitutions. This practice hath been introduced in the place of the ancient action of calumny, which compelled the plaintiff to pay the tenth part of his demand as a punishment; but this action is now disused; and instead of it, we have introduced the before-mentioned oath, and have ordained, that every rash litigant, who hath failed in his proof, shall be compelled to pay his adversary the damages and costs of suit.

Of Infamy.

II. In some cases the parties condemned become infamous, as in actions of theft, rapine, injury, or fraud. The parties condemned are likewise rendered infamous, in an action of tutelage, mandate, or deposit, if it is a direct, and not a contrary action. An action of partnership has also the same effect; for it is direct in regard to all the partners; and therefore any one of them, who is condemned in such action, is branded with infamy. But not only those who have been condemned in an action of theft, rapine, injury, or fraud, are rendered infamous; but those also who have bargained to prevent a criminal prosecution; and this is a right practice; for there is a wide difference between a debtor, on account of a crime, and a debtor upon contract.

Of summoning to Trial.

III. All actions take their commencement from that part of the prætor's edict, in which he treats *de in jus vocando*; that is, of calling persons into judgment: for the first step to be taken, in all matters of controversy, is to cite or call the adverse party to appear before the judge, who is to determine the cause. And, in the same part of the edict, the prætor hath treated parents and patrons, and even the children of patrons and patronesses, with so great a respect, that he does not suffer them to be called into judgment by their children or their freedmen, until application hath been first made to him, and leave obtained; and, if any man presumes to cite a parent, a patron, or the children of a patron, without such previous permission, he is subject to a penalty of fifty solidi.

TITLE XVII.

Of the Office of Judge.

Of the Office of Judge in general.

IT now remains, that we should enquire into the office and duty of a judge. And it is certain, that it ought to be his principal

care never to determine otherwise than the laws, the constitutions, or the customs and usages direct.

Of the noxal Judgment.

I. And therefore, if a suit is commenced by a noxal action, the judge ought always to observe the following form of condemnation, if the defendant deserves to be condemned; e. g. "I condemn Publius Mævius to pay Lucius Titius ten aurei, or to deliver up the slave who did the damage."

Of real Actions.

II. When a cause, commenced upon a real action, is brought before a judge for his determination, and he thinks proper to pronounce against the demandant, the possessor ought then to be acquitted; but, if the judge thinks it just to condemn the possessor, the party condemned must be admonished to restore the very thing which was in dispute, together with all its produce. But, if the possessor alleges that he is unable to make an immediate restitution, and petitions for a longer time, without any seeming intention to frustrate the sentence, he is to be indulged; provided always, that he gives caution, by a sufficient bondsman, for the full payment of the condemnation and costs of suit, if he should fail to make restitution within the time appointed. And, if an inheritance is sued for, a judge ought to determine just in the same manner, in regard to the profits, as he would in a suit for some particular thing only; for, if the defendant appears to have been a possessor *in mala fide*, then almost the same reasoning prevails in both actions in regard to the profits, whether they were taken by the possessor, or, through negligence, not taken by him: but if the defendant was a possessor *bona fide*, then no account is expected, either of fruits consumed, or of fruits not gathered, before the contestation of suit; yet note, that, from the time of contestation, all fruits must be accounted for, whether they were gathered and used, or left ungathered, through the negligence of the possessor.

Of the Action to exhibit.

III. If a man proceeds by an action *ad exhibendum*, it is not sufficient, that the defendant should exhibit the thing in question, but he must also be answerable for all profits and emoluments accruing from it; that the plaintiff may be in the same state, as if his property had been restored to him at the time, when he first brought his action; and therefore, if the possessor, during his delay to surrender the thing in dispute, shall gain a prescriptive title to it, yet such possessor shall nevertheless be condemned to restitution; for he shall not be allowed to avail himself of his own

delay. And farther, it is the duty of the judge to take an account of the profits of the middle time: that is, of the time between contestation and sentence. But, if the defendant declares, that he is not able instantly to produce the thing adjudged, and prays a farther time, without any appearance of affecting a delay, a term ought to be assigned him, upon his giving caution to make restitution. But, if he neither obeys the commands of the magistrate in instantly producing the thing adjudged, nor in giving a sufficient caution for the production of it at a future day, he must then be condemned to pay the full damages, which the demandant hath sustained by not having the thing delivered to him at the commencement of the suit.

Partition of an Inheritance.

IV. When a suit is commenced by the action *familiæ erciscundæ*, for the partition of an inheritance, it is the duty of the judge to decree to each heir his respective portion: and, if the partition when made, is more advantageous to the one than to the other, then ought the judge, as we have before observed, to oblige him, who has the largest part, to make a full recompense in money to his coheir: it therefore follows, that every coheir, who hath taken the profits of an inheritance to his sole use, and consumed them, is liable to be compelled to make a restitution. And this is the law not only when there are two heirs, but also when there are many.

Of dividing what is Common.

V. The same law is also observed, when a suit is brought upon the action *communi dividundo*, for one particular thing only, it being but a part or parcel of an inheritance, as for example, a field, or any piece of ground, which, if it can be conveniently divided, ought to be adjudged to each claimant in equal portions; and, if the share of one is larger than the share of another, the party, possessing such large portion, must be condemned to make a recompense in money. But, if the thing sued for is of such a nature, that it can not be divided, as a slave, or an horse for example, it must be given intirely to one of the copartners, who must be ordered to make a satisfaction in money to the other.

Of determining Boundaries.

VI. When the action *finium regundorem* is brought for the determination of boundaries, the judge ought first to examine, whether it is absolutely requisite to proceed to an adjudication: but it is, in one case, undoubtedly necessary; and this happens, whenever it becomes expedient, that any grounds should be divided by more conspicuous boundaries than they formerly were;

for necessity then makes it requisite, that a part of one man's ground should be adjudged to another, in which case it is incumbent upon a judge to condemn him, whose estate is enlarged, to pay an equivalent to the other, whose estate is diminished. It is also by virtue of this action, that any one may be prosecuted, who hath committed any fraud in relation to boundaries, by either removing stones, or cutting down trees, which supplied the place of landmarks. The same action will also subject any man to condemnation on account of contumacy, if he refuses to suffer his lands to be measured at the command of a judge.

Of Adjucation.

VII. And note, that whatever is adjudged by virtue of a sentence proceeding from any of these actions, the same instantly becomes the property of him, to whom it was so adjudged.

TITLE XVIII.

Of Public Judgments.

Difference from private.

PUBLIC judgments are not introduced by actions; nor are they in any thing similar to the other judgments, of which we have been treating. They also differ greatly from one another in the manner of being instituted and prosecuted.

Etymology.

I. These judgments are denominated public, or popular, because, in general, they may be sued to execution by any of the people.

Division.

II. Of these judgments some are capital, and others not capital. Those, we term capital, by which a criminal is prohibited from fire and water, or condemned to death, to deportation, or to the mines. The other judgments, by which men are fined and rendered infamous, are public indeed, but yet not capital.

Examples. Of lese Majesty.

III. The following laws denounce public judgments. The law *Julia majestatis* extends its force against those, who have been hardy enough to undertake any enterprize against the emperor or the republic. The penalty of this law is the loss of life, and the very memory of the offender becomes infamous after his death.

Of Adultery.

IV. The law Julia, which was made for the suppression of adulteries, not only punishes those men with death, who violate the marriage bed of others, but also those, who commit acts of

detestable lewdness with persons of their own sex. The same law also inflicts a punishment upon all, who are guilty of the crime called *stuprum*: which is that of debauching a virgin, or a widow of honest fame, without using force. The punishment of this crime in persons of condition is the confiscation of a moiety of their possessions: but offenders of low degree undergo a corporal chastisement with relegation.

Of Assassins.

V. The law Cornelia *de sicariis* punishes those, who commit murder, with death, and also those, who carry weapons, called *tela*, with an intent to kill. The term *telum*, according to Caius's interpretation, commonly signifies an arrow made to be shot from a bow, but it is now used to denote any missive weapon, or whatever is thrown from the hand; it therefore follows, that a club, a stone, or a piece of iron, may be comprehended under that appellation. The word *telum* is evidently derived from the Greek adverb τηλου, *procul*, because thrown from a distance. And we may trace the same analogy in the Greek word βελος; for what we call *telum*, the Greeks term βελος, from βαλεσθαι to throw; and of this we are informed by Xenophon, who writes thus:—" Darts also were carried, spears, arrows, slings, and a multitude of stones" Assassins and murderers are called *sicarii* from *sica*, which signifies a short crooked sword or ponyard. The same now also inflicts a capital punishment upon those, who practice odious arts, or sell pernicious medicaments, occasioning the death of mankind, as well by poison, as by magical incantations.

Of Parricides.

VI. The law Pompeia *de parricidiis* inflicts a new punishment upon those, who commit parricide, which is the most execrable of all crimes; and by this law it is ordained, that whoever, either publicly or privately, hastens he death of a parent or a child, or of any person comprized under the tie, or denomination, of a parent, shall be committed as a committer of parricide; and that any one, who hath advised, or been privy to the death of any of these persons, is also guilty of parricide, although he is a stranger, and not related to their family. A criminal, in case of parricide, is neither put to death by the sword, by fire, nor by any other ordinary punishment; for the law directs, that he shall be sewed up in a kind of sack, with a dog, a cock, a viper, and an ape, and, being put up in this horrid inclosure, shall be thrown either into the sea, or an adjacent river, according to the situation of the place, where the punishment is inflicted: thus, whilst he is yet alive, he is deprived of the very elements; so that his living body

is denied the benefits of the air, and his dead body the use of the earth. But if a man is guilty of the murder of any other person, related to him, either by cognation or affinity, he is only subject to the punishment inflicted by the law Cornelia *de sicariis.*

Of Forgery.

VII. The law *Cornelia de falsis*, which is also called *testamentaria*, punishes any man, who knowingly, and with a fraudulent intent, hath written, signed, dictated, or produced a false will, or any other instrument: it also punishes every one who hath made, engraved, or in any manner counterfeited the seal of another. The punishment inflicted by the law upon slaves in these cases is death; but the punishment of free persons is deportation.

Of Force.

VIII. The law Julia, concerning public and private force, takes place against all who use force, whether they are armed or unarmed; but, if proof is made of an armed force, the punishment is deportation by that law; and, if the force was not accompanied with arms, the penalty to be inflicted is the confiscation of one third part of the offender's goods: nevertheless, if a rape is committed upon a virgin, a widow, a nun, or upon any other person, both the ravishers and their accomplices are all equally subject to a capital punishment, according to the decision of our constitution, in which the student may read more at large of this matter.

Of Peculation.

IX. The law *Julia de peculatu* punishes those, who have been guilty of theft, in regard to public money, or any thing which is sacred; but, if judges themselves, during the time of their acting as such, commit a theft of this kind, their punishment is capital; and the punishment of all those, who assist in such a theft, or knowingly receive the money stolen, is also capital. But all other persons, who offend against this law, are only subject to deportation.

Of Men-stealers.

X. The law *Fabia* against plagiaries is also numbered among public judgments; but, in consequence of the imperial constitutions, the offenders against this law are sometimes punished with death, and sometimes by a milder punishment.

Of buying Offices, Bribery, Monopoly, Defalcation.

XI. There are also other public judgments; such are the Julian laws *de ambitu* (buying offices); *repetundarum* (bribery); *de annona* (monopoly); *de residuis* (defalcation), which do not

punish with death, but inflict other punishments upon those who offend.

Conclusion.

XII. But it is now time to conclude our institutions; and we declare it to be our intent, that this brief exposition of public judgments should serve only as an index, to give a general idea of that knowledge, which, through the blessing of God, may be most fully and particularly obtained, by perusing the digests with diligent attention.

BLESSED BE THE MAJESTY OF GOD AND OUR LORD JESUS CHRIST.

END OF THE INSTITUTIONS.